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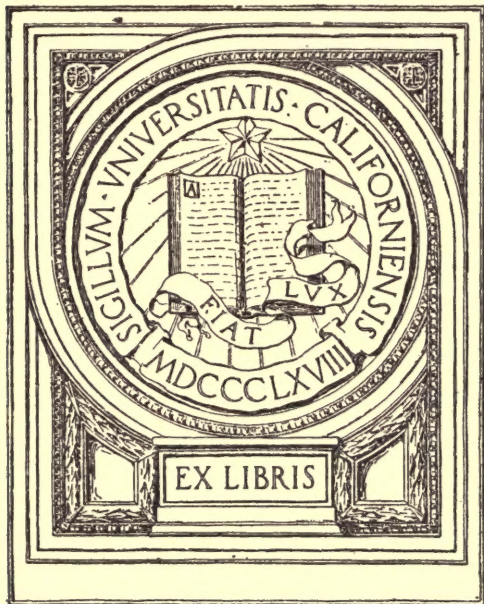
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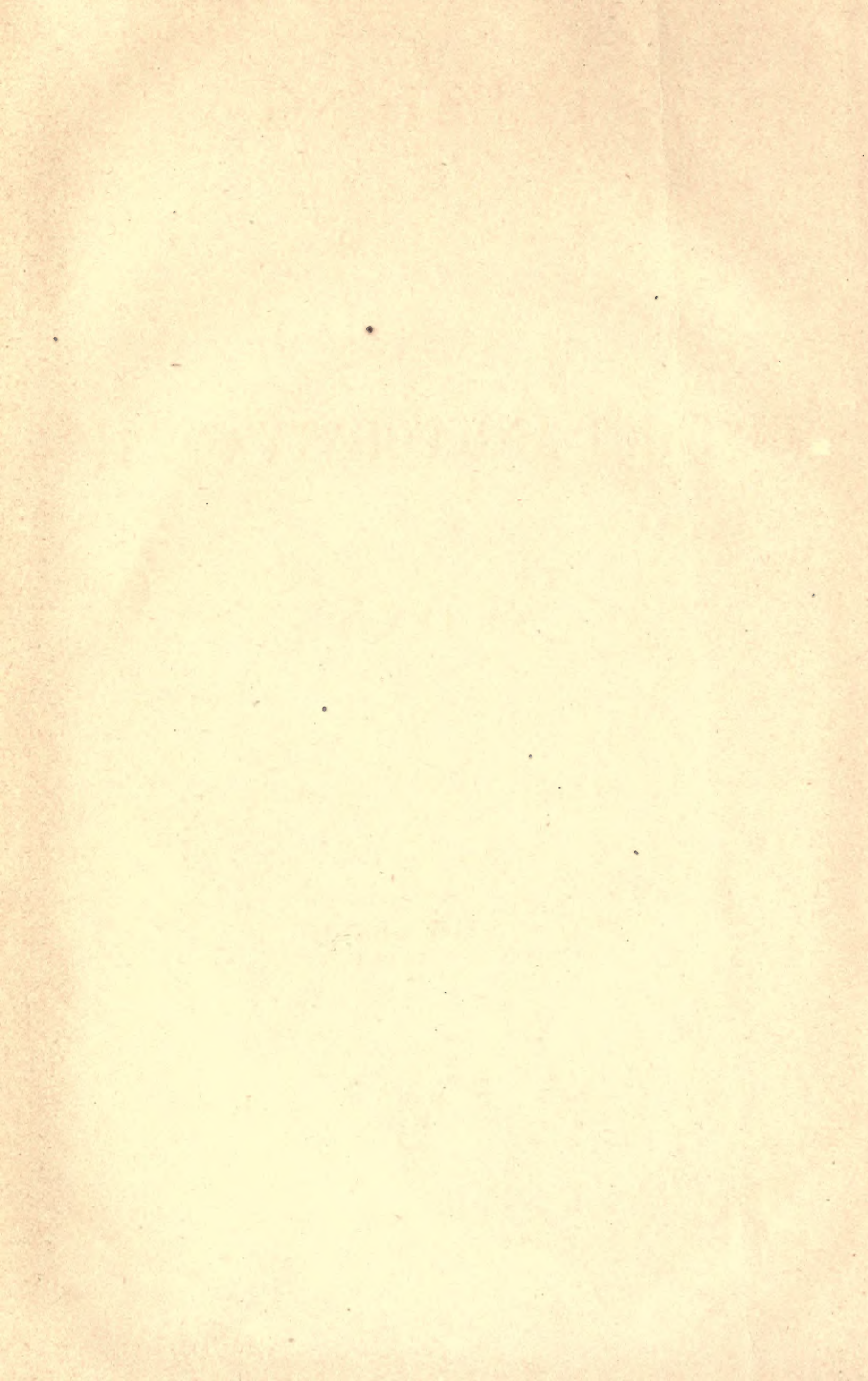
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PREFACE.

The Law of Texas is unique. It consists of a combination of much of the best in the Common Law and in the Roman Law systems, supplemented by many important original provisions. The Common Law is its base in most matters regulating substantive rights and in so much of procedure as relates to evidence and juries, and the Roman Law in many of the substantive rules pertaining to its land system and to marital rights, and in the blending of Law and Equity and in the rules of pleading.

These conditions gave rise to many and serious difficulties; but the men who founded our government and those who have since administered its affairs have proved themselves capable of dealing with these problems, and by their wisdom and courage have evolved from this seemingly incongruous grouping of discordant elements a symmetrical and harmonious system, which is entitled to the admiration of all lovers of good government.

One of the needs of the bench and bar of Texas to-day is a series of carefully prepared text-books tracing this process of development in the several branches of our system and clearly and accurately presenting the law as it now is, in the light thrown upon it from the past.

Among my duties in the University of Texas is teaching Pleading and Practice. Feeling that the Common Law works on these subjects, however excellent in themselves, are not applicable as practical expositions of these branches of our law, I undertook the task of searching out from original sources the principles which underlie our system of pleading and formulating the rules which govern their practical application. In so doing in all instances in which they seemed applicable I have consulted the Common Law and Equity authorities on the one hand and the Spanish and Mexican when accessible on the other; and in all instances the Texas authorities, both legislative and judicial, from the inception of our government. I have endeavored to make the work as

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practical as possible, and to give not only the principles governing the subject, but also the rules which should control the lawyer in the preparation of his case in the office and its presentation to the court in his pleading.

The book is entitled Texas Pleading, and this is the topic of which it treats; but to do this thoroughly and practically required consideration of a number of cognate subjects, such as the Judicial Functions of Government, Jurisdiction, Different Kinds of Proceedings, Parties, Venue, Motions, and numerous other matters, so that the book in one sense is broader than its title and includes many matters of practice not ordinarily considered as embraced in the term pleading.

In the appendix is given the full text of the rules of the Supreme Court for the several courts in Texas in force February 7, 1901. This was made practicable by the kindness of the ever-courteous Clerk of our Supreme Court, Dr. Charles S. Morse, to whom I here return my thanks.

In its mechanical features I have endeavored to make the book first class, and have spared neither time nor expense in the effort.

Hoping that the work may prove helpful, I submit it to the candid judgment of my brethren of the bar. With respect,

JNO. C. TOWNES.

State University, Austin, Texas, March 1, 1901.

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CHAPTER I.

THE JUDICIAL FUNCTION OF GOVERNMENT.

The word government signifies, first, the exercise of control; second, the control exercised; and third, the means through which this is accomplished. The word is used in law in each of these senses. Thus, we say that in the State of Texas the people govern themselves; that this government is beneficial to them, and that the form of government is republican. By this we mean that the people as a whole exercise control over themselves collectively and over each other individually, that the control thus exercised is salutary, and that the system of agencies through which the control is exercised belongs to the class known as republican.

The one idea common to all these uses of the term is regulation by a dominant power, so that every conception of government carries with it the idea of control over those subject thereto and limitation upon their conduct. Some degree of limitation is unavoidable in any social condition.

If one man were alone in the world his rights and duties could not extend beyond the strictly personal and religious. He would sustain no social relations; could have no social rights; and could owe no social duties; but so soon as a second man should come upon the stage of action, social relations would spring up between the two. If the first should by any means continue his former status, unaffected by the advent of the second, this would necessarily involve the abject subjection of the second to him; for by just so much as the right of the second was recognized, by that much would the free action of the first be limited. This necessarily results from the correlative and inseparable nature of right and duty. If no religious or moral or legal standards of right and duty were recognized between the parties fixing their respective obligations, their relations would be simply a question of force and cunning, the victor destroying or absolutely controlling the vanquished. This would be unlimited license to the stronger and unlimited subjection of the weaker. Liberty to both would be equality between the two; that is,

the recognition by both of the just claims of each to an equal opportunity for life and development, and the exercise by both over both, or both over each and each over the other, of only so much restraint as would most effectively prevent either from encroaching upon the equal claims and privileges of the other. The same thing is true if we enlarge the number of individuals in the community. Though there may be increased difficulty in applying the principles, the principles themselves which form the basis of civil liberty are ever the same. Regulation, producing the results above indicated, self-imposed by each member of society, would constitute the ideal social state. Unfortunately, however, men are not so constituted as to render such self-regulation possible; and therefore, in order to approach as nearly as may be to this condition of liberty, in each community restraints must be imposed upon every individual by some power capable of enforcing itself. The imposition and maintenance of these restraints by a power outside of each individual subject thereto, adjusting the relations between and among these individuals, and prescribing rules for each to observe in his conduct toward the others, is government in the primary sense of the word.

The power imposing such restraints politically over any community is the sovereign as regards that people. The aggregate or collective body of persons subject to the same governmental power constitutes a State or people. The system of agencies through which this power acts in exercising its control is the municipal or civil government of that State or people, and the announced and enforced will of the sovereign as to the nature and extent of these restraints and the means and manner of enforcing them is the law of that State or people.

Sovereignty, therefore, may be defined as the supreme political power in a State; a State, as the collective body of individuals subject to the same sovereign power; civil or municipal government, as the system of agencies through which sovereignty manifests itself; and law, as the will of the sovereign announced and enforced in and through these agencies.

There are many theories as to the origin of municipal government, and doubtless there is some truth in each; but these and their respective claims to recognition are matters apart from our present purpose.

There are also many opinions as to the proper seat of sovereignty—whether it pertains to some one favored individual, or to some special class or classes, or inheres in the whole people. Differences in opinion as to the proper agencies through which it should manifest itself are correspondingly great. But, whatever views may be entertained on these subjects, two facts remain indisputable: first, that any system of municipal government involves to some extent loss of individual freedom of action; and, second, that civil liberty is possible only through restraint exercised without discrimination over all members of the community by a power regardful alike of the claims and interests of each.

Common law ideas and doctrines as to governmental institutions, like all else of value in that system of jurisprudence, are the result of gradual processes of growth. The power of truth and excellence of justice, working patiently through the long ages of the past, have slowly but surely compelled recognition, and have so incorporated themselves into the very substance of the common law that practical equality in right and opportunity is now its dominant principle.

At various stages of this political development there have been great differences in the nature and extent of the restriction placed upon the individual. Some of the most noticeable of these differences are found in limitations imposed from time to time upon the right of self-help, that is, the right of the individual to prevent wrongs when threatened, or to redress them when they have already been sustained. In the early stages, the latitude allowed the individual in these respects was large; later it was taken almost entirely away, and in nearly every instance of wrong, whether apprehended or accomplished, the person affected was compelled, under severe penalties, to resort for redress to governmental agencies. Later a more conservative course was adopted and the right of self-help was recognized at common law in five kinds of cases; first, certain cases of defenses of one's self and of others from unlawful violence; second, in recaption of persons or personal property unlawfully seized or withheld; third, in re-entry upon real estate unlawfully seized; fourth, in abatement of nuisances; and fifth, in cases of distress.

Our law permits to the individual the right to protect himself or others against threatened injury about to be inflicted by unlawful violence, and in so doing he may use such degree of force as is, or reasonably appears to be, necessary.¹ He may also repossess himself of real or personal property belonging to him and unlawfully withheld, provided this can be done without violence or breach of the peace. He may abate nuisances, subject to the same limitations. It must be observed that in these matters the right of self-help is confined to wrongs actually transpiring or immediately imminent; it does not extend to redress of past injuries, nor to the prevention of wrongs still so far in the future that resort might be had successfully to governmental agencies. The proceeding in distress has been superseded. Except in the above instances, our law denies to the individual the right of self-help.

Since the government imposes these limitations, it is justly bound to do for the individual that which it denies him the privilege of doing for himself; and hence it results that affording protection against present or prospective injury and giving redress for past wrongs are the paramount, if not the only, true functions of government.

Sovereignty rightfully exists in the people governed. It is impossible for such a sovereign to act directly. Agencies of some sort must be pro-

¹ Penal Code, title 15, chap. 1, and chap. 11, subdiv. 4.

vided, and the sum or aggregate of these agencies constitute the organization of the State, which, as before stated, is called the government. To accomplish this organization the people ordain constitutions, declaring their will as to the form of government to be effected, creating agencies to carry out and administer their sovereign will, defining the powers given to these agencies and the manner of their exercise. These written constitutions, being acts of the people themselves, are the supreme law. They constitute at once the sources of, and the limitations upon, the powers of the several representatives of sovereignty called into being therein.

DIVISION OF POWERS.

The powers inherent in sovereignty and exercised by it through its governmental agents are of three general kinds: first, the power to make law; second, the power to construe the law and apply it to particular cases; and third, the power to enforce the application so made. These powers are respectively designated Legislative, Judicial, and Executive.

These natural divisions have long been recognized. There is no formal declaration of them in the Federal Constitution; but the distribution of power and duty among the departments and officers of the government is an actual and very practical acknowledgment of them. In the Constitution of the Republic of Texas, adopted in 1836, there is an express enunciation of these powers, and a sharp line of separation is drawn between them in these words: "The powers of government shall be divided into three distinct departments, namely, the legislative, the judicial, and the executive, which shall be forever separate and distinct."

The first Constitution of the State of Texas, adopted in 1845, under which the State entered the Union, expresses the same idea in amplified form, as follows:² "Powers of the government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistrates, to wit: those which are legislative to one, those which are executive to another, and those which are judicial to another; and no person or collection of persons being of one of these departments shall exercise any power properly attached to either of the others, except in the instances herein expressly provided." This provision, with the change of two words only, which in nowise affect its meaning, has been retained in the organic law of this State through all its modifications, and is a part of the present Constitution. This careful separation of each department of government from every other, both in duty and authority, is one of the chief guarantees of the safety of our institutions. Each department is supreme within its sphere, and

² Art. 2, sec. 1.

each is absolutely powerless beyond its limits. Efforts by an officer in one department to exercise authority belonging to any other would be mere usurpation and bind no one. Each department, looking out for its own prerogatives, is quick to discover and prevent any attempted invasion by another, and this constant vigilance by each is a check upon the others and inures to the benefit of the whole people.

It may be said with fair accuracy, though not with exactness, that the power and duty of prescribing rules which are to control future conduct pertain to the legislative department; the power and duty of investigating past conduct and determining its conformity or nonconformity to these rules as they existed at the time that the transaction took place and of declaring and applying the sanctions of the law thereto pertain to the judicial department; and the power and duty of enforcing and carrying into effect the lawful actions of the other departments pertain to the executive.

JUDICIAL FUNCTION.

Municipal law has two great divisions,—criminal and civil; and each of these is subdivided into substantive and remedial or adjective, and the civil division is again subdivided into two branches, contract and noncontract. In both criminal and civil cases it is the sanction of the law which vitalizes and makes effective legal rights—in criminal law, of the public; and in civil law, of the individual. In other words, in criminal law and in civil, both contract and noncontract, legal right depends upon legal sanction,—that is, upon legal recognition of the right and enforcement of penalties for its violation. Crime does not consist in doing an act harmful to the public, but one forbidden by law, to the doing of which a legal penalty is attached. A contract is not an agreement simply, but is an agreement enforceable by law. A tort is not merely a wrong, but a wrong which may be redressed by law—the violation of a right or the breach of a duty for which a legal civil remedy is provided. It is the sanction of the law that gives binding force to both contract and noncontract duty. To hear and determine alleged violation of such legal rights and to apply, announce, and enforce the sanctions of the law against parties found to have been guilty of legal wrong is the judicial function of the government. The agencies created by the sovereign through which to exercise this function are termed courts.

COURTS.

A court is an agency of the sovereign created by it, or under its authority, consisting of one or more officers, for the purpose of hearing

and determining issues of law and fact regarding legal rights and alleged violations thereof, and applying the sanctions of the law, exercising its powers in due course of law at times and places previously determined by lawful authority.

Many of the old definitions of a court seem to be crude and misleading. They are not true, in fact, and do not tend to give true conceptions of a court or of the purposes for which it is created under our form of government.

Analysis of Definition.

(1) "A court is an agency of the sovereign." As such agency it is subject to all of those principles and limitations which are inseparable from a representative position. It is not created to subserve its own purposes, pronounce its own judgment, nor enforce its own will; but must in all things subserve the purposes, pronounce the judgment, and enforce the will of its principal, the sovereign whom it represents. It can not lawfully go beyond the authority which has been delegated to it, but, like other agents, it stands for its principal only so far as, and in such matters as, the principal has empowered it to act.

(2) "Created by the sovereign or under its authority." As the court is the representative of the sovereign, its power must be derived from it. In States where the Constitution creates certain courts and is silent as to the power of the Legislature to create others, many nice questions have arisen as to whether such power exists. This was formerly a very important and practical question here, but under our present Constitution there would seem to be no reason for further difficulty on this subject, since that instrument creates certain courts and expressly authorizes the creation of such others as may be provided by law. It seems clear that, while the Legislature can not destroy or dispense with any of the courts created by the Constitution, it may from time to time provide such others as in its judgment public interests may demand³.

(3) "Consisting of one or more officers." Care must be taken to distinguish between the court, which is a legal entity, and the persons through whom the court acts. The court is not the judge, nor any number of judges considered individually. It is not the judge, the clerk, the sheriff, the lawyers, and the jury, considered separately and individually, although all these are respectively members and officers thereof. It is a distinct legal entity or being, representing and acting for the sovereign, of which the above named officers, or such of them as may be specified by law in any given case, when convened at the time and place

³ Jurisdiction of Courts, *infra*; *Leach v. State*, 39 S. W., 471; *Ex Parte Knox*, 39 S. W., 570; *Harris County v. Stewart*, 91 Texas, 133, 41 S. W., 650; *May v. Finley*, 91 Texas, 352, 43 S. W., 258'.

and for the purpose specified by law, are the visible exponents and active representatives. While it is always essential to the actual discharge of the functions of a court that there shall be present some official person, yet such a person is not properly the court. He is the active, living agent, through whom this invisible agency of sovereignty manifests itself and exercises its power, but he is not that agency.

This distinction is recognized by the Constitution when it declares that the judicial power of this State shall be vested in one supreme court, in courts of civil appeals, courts of criminal appeals, district courts, county courts, commissioners courts, justices' courts, and such other courts as may be prescribed by law. This power is not vested in the judge or judges, but in the *courts*.

The constitution and law are careful to preserve a well defined line of separation between the respective powers and duties of the courts and the judges. This may be illustrated by the authority granted to issue writs of injunction. The power to hear and finally determine cases in which injunction is the remedy is vested exclusively in the *courts*, though the judge has authority to grant temporary writs of injunction either in term time or in vacation; such temporary writ may also be dissolved by the judge either in term time or in vacation. In so doing he, as judge, sets aside that which he did as judge in granting the writ. But a judge merely as such can not grant a final writ of injunction; nor can he dissolve such a writ. Neither can he, when, as judge, he declines to grant a writ, or dissolves one theretofore granted, dismiss the case and settle the controversy. This can be done only by the *court*. If the judge should undertake by an order entered in vacation to dismiss the case upon the dissolution of the writ, such action by him would be null. In the case of *Price v. Bland*⁴ this point is expressly decided. The object of the proceeding was to enjoin the collection of taxes. A temporary writ of injunction was granted by the judge. In vacation a motion to dissolve the injunction was made and was granted, and as the motion to dissolve the writ practically settled the controversy, the judge attempted to dismiss the case and made an order to that effect, and had it entered in the form of a final judgment. Appeal was taken to the Supreme Court and the appeal was dismissed on the ground that the dismissal of the case by the district judge was without effect, and as no final judgment had been rendered in the district court, the case was still pending there. In *Galloway v. Crews*, decided by the Court of Civil Appeals at Austin in September, 1895, no report of which has been published, the same point was even more forcibly sustained. A local option election had been ordered. Under the statute it was necessary to publish the order for four consecutive weeks in a local newspaper. Three such publications had been made. A writ of injunction was sued out to

⁴ 44 Texas, 145.

prevent the fourth publication. A temporary writ was granted by the district judge in another district and the publication was stayed. The defendants made a motion before the district judge of the district in which the proceeding was pending to dissolve this temporary writ. This motion was heard in an adjoining county during the vacation of the court. The judge dissolved the temporary writ. The plaintiff insisted that this was a final disposition of the case and gave notice of appeal and filed a supersedeas bond,—the effect of such a bond in cases of final judgment being to prevent the judgment of the lower court from having any effect during the pendency of the appeal. The defendants regarded the writ as dissolved and proceeded to make the fourth publication. The plaintiff at once took out and filed a transcript of the case in the Court of Civil Appeals, and there made a motion against defendants for contempt by violating the writ of injunction. The facts were not disputed. The only question before the court was,—did the facts that the order entered in vacation dissolving the temporary writ practically settled the whole controversy, and that the fourth publication, which was thereby permitted would be made, before the next term of the court, make such action a final judgment? The court held that they did not,—as the judge was without power to finally dispose of the case during vacation, and that this rule could not be affected by the peculiar conditions which made such action practically decisive of the rights of the parties. These illustrations show the difference between the authority of the court and of the judge.⁵

(4) “For the purpose of hearing and determining issues of law and fact regarding legal rights and alleged violations thereof, and applying the sanctions of the law.” These words declare the purpose for which this agency is created. It is to hear and determine; that is, to investigate fully, thoroughly, and impartially, and to settle authoritatively all such issues as are lawfully submitted to it. These issues must be real and arise in real controversies. Courts do not sit to try abstract questions, nor social, nor political, nor religious questions, nor questions of any class except of law and fact regarding alleged legal rights and violations thereof. These legal rights and violations may be either public or private. The judicial power extends to both. The authority to vindicate the rights of the public constitutes the criminal jurisdiction of the courts, and authority to vindicate private rights their civil jurisdiction. This power of the courts goes further than the simple ascertainment of facts and the expression of an opinion thereon; it includes the capacity for authoritative settlement of issues and actual enforcement of the determination arrived at. By this instrumentality the sovereign ascertains the real facts in any given case, and applies the law thereto and enforces its will as to that particular matter. The strong arm of the sovereign

⁵ See also *Hines v. Morse*, 92 Texas, 194, 47 S. W., 516.

is extended by the court through the officers under its command, to the persons or property of those guilty of legal wrong and makes them suffer the penalties provided, if the wrong be of a public nature, in the punishment of the crime, or if the wrong be private, in just compensation to the injured individual.

(5.) "Exercising its powers in due course of law." The expression "due course of law" the courts have declined to define. As used here, it is intended to convey the idea that every court must act in subordination to and in compliance with the will of the sovereign, as expressed in the Constitution and statutes of the State, and in those general, fundamental principles of law which are recognized as of universal obligation; that there must be lawful authority for the court's proceedings, and that in all its actions it must be governed by the law.

(6) "Exercising its power at such time and places as may be previously determined by lawful authority." The judicial power must be exercised at the proper time and place. These must have been antecedently determined by lawful authority. "It is a fundamental principle that common law courts can exercise judicial functions only at such times and places as may be fixed by law, and that judges can enter no orders in vacation except such as are expressly authorized by law."⁶

It is not, however, necessary that the Constitution or statutes should in every instance name the exact time and place when and where the court must be held. This is ordinarily done, but it is sufficient if the law clearly and specifically authorizes some competent authority to fix the time and place. This is illustrated by our statutes with reference to justices of the peace, which empower the commissioners court of the several counties to fix the times for holding court for civil business in each justice's precinct within the county, and authorize the justice himself to select the place within his precinct at which his court will be held, and also by the statutes authorizing the holding of criminal court by the justice at any time. Such powers as these could not be exercised by the commissioners court or the justices without this legislative authority; but such authority having been conferred, the times and places designated thereunder for holding the courts are lawful. When, however, the law does specifically fix the time and place for holding the court, these specifications are absolutely binding, and the judge can not hold court at any other time or place. Our Constitution provides that the Legislature may make provision for special terms of the district courts, and it has done so, and such terms held in conformity with this statute are lawful.⁷

⁶ 12 Am. and Eng. Enc. of Law, title, "Judge," 14.

⁷ Dorst v. Waggoner, 3 Texas, 515; Whitener v. Belknap, 89 Texas, 281, 34 S. W., 594; Wilson v. State, 35 S. W. 390; Williams v. Ruetzel (Ark.), 29 S. W., 374; Rev. Stats. 1895, art. 1113.

USUAL OFFICERS OF A COURT.

As these agencies of the government can only act through persons selected for that purpose, it follows that in every court there must be some officer authorized to exercise each phase or element of the power conferred upon the court. That is, there must be some one to hear and determine causes and carry the determination into effect. Experience has taught that the assistance of additional officers is very useful, if not essential, to the discharge of these important functions. Every cause involves matters of law and of fact, which must be decided in its determination. In some jurisdictions, as in equity, all issues of both classes arising in the case are decided by the one officer; in others, as in the common law courts, issues of law are decided by the judge or judges, and issues of fact, unless arising in some interlocutory matter, are decided by others, known collectively as a jury. In the Spanish and Mexican courts existing here before the Texas Revolution, issues of law and of fact were both decided in those courts, which tried cases in the first instance by three officers acting together. One of these was a judge, a regular officer, who participated in the trial of all causes determined in the court; the other two were persons selected from among the citizens where the court was sitting to act in the particular case.⁸

But whatever the system, provision must be made for hearing and deciding both classes of issues, those of law and those of fact. The executive officer of the court is he who, under the direction of the judge, upon orders duly issued, carries out the determinations of the court and executes all process issued as a final means of compelling obedience to the judgment and in the progress of the trial to facilitate the hearing. In common law he is denominated a sheriff, constable, or bailiff; in the Federal court, he is known as the marshal. For the purpose of securing permanent evidence of all important proceedings and the results arrived at, an officer is appointed to keep a record of all such matters. He is usually called the clerk. To aid in the investigation of the law and facts of each case other officers, with us known as attorneys or counselors at law, are licensed by the government and permitted to appear for the parties interested in the issues pending. These are not essential to the existence or action of a court, but are usually deemed helpful in the conduct of its business.

⁸ Decree No. 39, Laws Coahuila and Texas, June 22, 1827.

DISTRIBUTION OF JUDICIAL POWER.

The next question arising as to any particular government is, does this government create only one agency and confer upon it all judicial powers, authorizing it to hear and determine all cases arising under its laws, or does it create several agencies and divide this power among them? If the latter policy is adopted, then the further inquiry is, upon what lines is this division made, and what kinds of cases are committed to each tribunal? There are no questions of more importance to the practitioner.

Jurisdiction is usually divided among the several courts of a government with reference to one or more of the following matters, viz: The nature of the subject matters to be litigated, including the rights involved, the wrongs complained of, and the remedies sought; the parties to the suit and their residence and citizenship; and the place at which the cause of action arose or the thing involved in the suit is situated.

With us, both the State and National governments have adopted the policy of dividing the authority conferred upon their respective courts, and we find in each a system of tribunals, each of which has prescribed powers in the exercise of which its action is lawful and is sustained by the strength of the government, but beyond which it can not properly go,—any action attempting to do so having no legal basis or support. The division of jurisdiction among our State courts is almost entirely based on the nature of the subject matter; the instances in which parties and locality are taken into account are very few.⁹

JURISDICTION OF STATE COURTS AS AFFECTED BY THE POWERS OF THE FEDERAL GOVERNMENT.

The general government and the government of the several States are not in the enforcement of civil laws enacted by either regarded as foreign to each other. The laws of the United States are binding upon the several State courts, and the laws of each State are binding upon the Federal courts held within it. In legislative matters the powers of the State and Federal governments are usually exclusive of each other, the rule being that the State and the United States can not concurrently exercise direct legislative control over the same subject matter. This principle of exclusion has much less application in the judicial department of the governments. The courts of each being organized to enforce legal rights, and the laws of each government being binding upon the

⁹ See Chapter II, *infra*.

courts of both, it follows that these laws must be considered by the courts of each in determining the rights of individuals. To illustrate,—the power to control interstate commerce by legislation is vested exclusively in Congress. No action on this subject by a State Legislature would be of any force or effect. It could not constitute the basis of a legal right in either a State or Federal court. Congress having legislated with reference to this subject matter, such legislation is binding upon the courts of both governments, and unless some other ground for exclusive jurisdiction in the Federal courts exists in a case arising out of interstate commerce, such cause could be adjudicated in the State courts, and the same rules would be applied therein in determining the rights of the parties under the Federal legislation as would be applied were the suit brought in a Federal court. On the other hand, the power to legislate with reference to land titles is vested exclusively in the government of the State in which the land is situated, and Congress can pass no law directly affecting such titles; but if a controversy arises between citizens of different States regarding land titles of two thousand dollars or more in value, these rights, although dependent upon the State law, can in many instances be litigated and determined in the Federal courts. The same is true in many other kinds of cases. There are, however, many civil cases over which the State courts have exclusive jurisdiction, and a few over which the Federal courts have exclusive jurisdiction. The rules for determining this matter seem to be substantially as follows: As the State governments represent the people more directly than the Federal government, and as all authority not granted to the general government by the Federal Constitution, expressly or by fair implication, is vested in the several States, it follows that the tribunals to which resort must ordinarily be made upon the violation of any right are the State courts, and such tribunals will have jurisdiction of the matter even though the right arises from or is regulated by the Federal Constitution or act of Congress, unless there is an exclusive grant of jurisdiction to the Federal courts over the particular case or the class of cases to which it belongs. If there is such exclusive grant it controls, and the State courts have no jurisdiction. However, the grant of jurisdiction to the Federal courts, unaccompanied by anything showing an intent to deny the power to the State courts to enforce the right, would create concurrent jurisdiction in the tribunals of the two governments; but if the grant of jurisdiction to the Federal court is made exclusive by affirmative action of Congress, within the scope of its authority, or by the Federal Constitution, then the State courts could not entertain jurisdiction.

In criminal matters, the jurisdiction of each government and of its courts is practically exclusive of the other. The same act may sometimes be violative of the laws of each sovereign; in such cases the party would be subject to punishment therefor in either court according to the law of the government; and, but for the inhibition against being

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twice put in jeopardy for the same offence, he might be punished by both. Just how far this inhibition protects from double punishment under these circumstances does not seem to be definitely settled.

The effect of attempting directly to give extraterritorial effect to State laws will be further considered in connection with jurisdiction over the person, and proceedings *in rem* and *in personam*, in Chapter III, and jurisdiction of the courts of Texas over cases arising beyond the limits of the State will be discussed in Chapter II, on "Jurisdiction."

CHAPTER II.

JURISDICTION.

SUNDRY DEFINITIONS OF THE TERM.

In *United States v. Arredonda*¹ the Supreme Court of the United States says: "The power to hear and determine a cause is jurisdiction; it is *coram judice*, whenever a case is presented which brings this power into action; if the petitioner states such a case in his petition that on demurrer the court would render judgment in his favor, it is an undoubted case of jurisdiction; whether on answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction conferred by the filing of a petition containing all the requisites and in the manner prescribed by law."

In *Rhode Island v. Massachusetts*² the same court defines jurisdiction as follows: "Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; the question is whether, on the case before the court, their action is judicial or extrajudicial, with or without the authority of law to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it."

In *Banton v. Wilson*³ both of the foregoing definitions are quoted with approval by the Supreme Court of this State. In *Withers v. Patterson*⁴ our Supreme Court says: "The jurisdiction of a court means the power conferred upon it by the Constitution and laws to determine causes between parties and carry its judgment into effect." In *City of Brownsville v. Basse*⁵ the following definition is given: "Jurisdiction is the power to hear and determine a cause—the authority by which judicial officers take cognizance of and decide them. It gives the court capacity to do both or either—to hear without determining, or determine without hearing. * * * Jurisdiction to determine a cause unquestionably implies power and authority to render such judgment

¹ 6 Peters, 709.

² 12 Peters, 718.

³ 4 Texas, 404.

⁴ 27 Texas, 494.

⁵ 43 Texas, 449.

as the court may conclude should be given unless a limitation is manifest from the nature of the proceeding, the character of the tribunal, or by clear and positive legislative enactment."

With regard to the power to render a particular judgment and enforce a certain penalty, possibly the most interesting American case is *Ex parte Lange*⁶, decided by the Supreme Court of the United States in 1874. The matter is so ably discussed that we quote at length from the opinion: "A judgment may be erroneous and not void, and it may be erroneous *because* it is void. The distinctions between void and merely voidable judgments are very nice, and they may fall under the one class or the other as they are regarded for different purposes.

"We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternate punishments to which alone the law subjected him, the power of the court to punish further was gone; that the principle we have discussed then interposed its shield, and forbade that he should be punished again for that offense. The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case, and for that very offense, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist.

"It is no answer to this to say that the court had jurisdiction of the person of the prisoner, and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void. Or if on an indictment for treason the court should render a judgment of attainder, whereby the heirs of the criminal could not inherit his property, which should by the judgment of the court be confiscated to the State, it would be void as to the attainder, because in excess of the authority of the court, and forbidden by the Constitution.

⁶ 18 Wallace, 175.

“A case directly in point is that of *Bigelow v. Forrest*. In that case, under the confiscation acts of Congress, certain lands of French Forrest had been condemned and sold, and Bigelow became the holder of the title conveyed by these proceedings. After Forrest’s death his son and heir brought suit to recover the lands, and contended that under the joint resolution of Congress, which declared that condemnation under that act should not be held to work a forfeiture of the real estate of the offender beyond his natural life, the title of Bigelow terminated with the death of the elder Forrest.

“In opposition to this it was argued that the decree of the court confiscating the property in terms ordered *all* the estate of the said Forrest to be sold, *and that though this part of the decree might be erroneous, it was not void*. Here was a case of a proceeding *in rem* where the property was within the power of the court, and its authority to confiscate and sell under the statute beyond question; but the extent of that power was limited by the statute. The analogy to the case before us seems almost perfect. In that case the court said: ‘It is argued, however, on behalf of the plaintiff in error that the decree of confiscation of the District Court of the United States is conclusive, that the entire right, title, and interest of French Forrest was condemned and ordered to be sold; that as his interest was a fee simple that entire fee was confiscated and sold. Doubtless, a decree of a court having jurisdiction to make the decree can not be impeached collaterally, *but under the act of Congress, the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest. Had it done so, it would have transcended its jurisdiction.*’ The doctrine of that case is reaffirmed in the case of *Day v. Micou* at the present term, where it is said that in the case of *Bigelow v. Forrest* ‘we also determined that nothing more was within the jurisdiction or judicial power of the District Court (than the life estate), and that consequently a decree condemning the fee could have no greater effect than to subject the life estate to sale.’

“But why could it not? Not because it wanted jurisdiction of the property or of the offense, or to render a judgment of confiscation, but because in the very act of rendering a judgment of confiscation it condemned more than it had authority to condemn. In other words, in a case where it had full jurisdiction to render one kind of judgment, operative upon the same property, it rendered one which included that which it had a right to render, and something more, and this excess was held simply void. The case before us is stronger than that, for unless our reasoning has been entirely at fault, the court in the present case could render no second judgment against the prisoner. Its authority was ended. All further exercise of it in that direction was forbidden by the common law, by the Constitution, and by the dearest principles of personal rights, which both of them are supposed to maintain.

“There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either the Constitution of the United States or the well settled principles of the common law, we have come to the conclusion that the sentence of the Circuit Court under which the petitioner is held a prisoner was pronounced without authority, and he should therefore be discharged.”

Mr. Black, in his valuable work on Judgments, devotes a whole chapter to “The Validity of Judgments as Dependent upon Jurisdiction;” in the course of which he discusses various definitions and finally formulates one of his own in the following language: “Etymologically the word ‘jurisdiction’ signifies the power or duty of ‘declaring right,’ that is, of declaring, in the official character of a judge, what is the law applicable to a given state of facts, or what are the respective rights of parties, as determined by the application of law to the facts before the tribunal. The precise definition of the term, however, is rendered difficult by the complexity of the elements which enter into this power, and many of the explanations found in the books are partial or onesided according as they lay the greater stress upon the one or the other constituents of jurisdiction. The Supreme Court of Ohio has declared that ‘the power to hear and determine a cause is jurisdiction, and it is *coram judice* whenever a case is presented which brings this power into action. But before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred; and that such person or thing has been properly brought before the tribunal, to answer the charge therein contained.’ Now this definition is open to exception in several respects. In the first place, the first clause is too restrictive. As has been justly said, it is in truth the power to do both or either; to hear without determining, or to determine without hearing. But even this does not go far enough. For jurisdiction is not merely the authority to determine a controversy, but also the power to announce the sentence of the law, and to announce it in such a manner that the legal rights of the parties shall be changed or modified and that new relations shall spring into existence. And, further, it sometimes includes the power to command or forbid particular action or to award a particular remedy, as in the case of mandamus, injunction, or specific performance. In other words, jurisdiction is the power to set in operation the sanctions of the law. Again, while the preferring of a complaint or petition is the usual and regular mode of bringing a contro-

versy to the cognizance of a court, it would be incorrect to make the jurisdiction depend upon the technicality or sufficiency in law of the case so presented. It is undoubtedly a principle of natural justice and of the law of the land that a person who is proceeded against in a court of law should have a full and fair opportunity to make his defense. But if he is denied this right, it seems to be rather an irregularity or failure of justice, on the part of the tribunal, than a fatal defect in its jurisdiction. If the defendant is duly served with process and so brought into court, that confers jurisdiction over him, and it is not affected by any subsequent illegal or arbitrary dealing with his rights. Nevertheless the Supreme Federal Court has held that an opportunity to the defendant to be heard is an essential element of jurisdiction—a decision which perhaps can be sustained on the theory that the court, by the denial of such opportunity, revokes its process, and puts the defendant again out of court, but which otherwise appears to put an undue strain upon the meaning of the word.

“We should therefore define jurisdiction as follows: It is the power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court to pronounce the sentence of the law, or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favor of or against persons (or a *res*) who present themselves, or who are brought, before the court in some manner sanctioned by law as proper and sufficient. If this definition appears complicated, it is because of the necessity of grouping three very different elements. For jurisdiction naturally divides itself into three heads. In order to the validity of a judgment, the court must have jurisdiction of the persons, of the subject matter, and of the particular question which it assumes to decide. It can not act upon persons who are not legally before it, upon one who is not a party to the suit, upon a plaintiff who has not invoked its arbitrament, or upon a defendant who has never been notified of the proceeding. It can not adjudicate upon a subject which does not fall within its province as defined or limited by law. Neither can it go beyond the issues and pass upon a matter which the parties neither submitted nor intended to submit for its determination.”

SUGGESTED DEFINITION.

The jurisdiction of a court is its authority to represent and act for the sovereign in the exercise of so much of the judicial function of the government as is delegated to it.

The judicial function has three distinct aspects:

(1) The power to hear issues.

(2) The power to adjudge issues, including the determination of the issues, and the announcement of the sanction of the law applicable thereto; and

(3) The power to enforce the conclusion thus arrived at.

The jurisdiction of any particular court may include the exercise of any number or all of these powers.

Issues are matters of law or fact or both affirmed by one person and denied by another, regarding alleged legal rights and past, existing, or apprehended violations thereof. Courts do not adjudicate abstract questions. Their work is always with concrete cases. To illustrate,—the Constitution does not say that district courts shall have jurisdiction over all questions regarding title to real estate, but that they shall have jurisdiction to try *all suits involving title to land*. However interesting or important the question may be, the court has no concern with it until it is involved in some suit to which its jurisdiction has actually attached. It is true that the general authority to hear suits of the kind to which the particular controversy belongs must exist, but the actual right to hear and determine any particular question only arises when a suit involving such question comes into being. That is, when a controversy involving the point is presented to the court for its decision and proper steps have been taken to bring within its power all the necessary parties to such controversy. Thus A has two notes against B and both are due; he sues on one only and gets service. If the defendant appears and A produces both notes and wishes to recover on both, he can not do so. He can only have judgment on the one sued on, because the second has not been brought within the jurisdiction of the court. Again, if he had sued on one only and got service as to that, and subsequently amended his petition so as to include the second and gave no notice of the amendment to B, and B failed to answer and judgment by default were taken against him, including the amount due on the second note, and these facts affirmatively appeared on the record, so much of the judgment as was based on the second note would be void because as to it jurisdiction had not been got over B.

In short, courts can only decide suits, and suits are not abstract questions, but actual controversies properly submitted to a court about designated subject matter between parties, properly brought within the power of the court.

In theory of law there must always be two parties before the court, though in some proceedings the second party does not actually appear and represent his interests, and in some kinds of cases he is very hard to discover.

He who presents the issue to the court, affirming his right in the subject matter, is the actor or plaintiff. He against whom the right is sought to be enforced and the penalty or redress to be adjudged, is the *reus* or defendant. The rights claimed by the plaintiff, wrongs charged

against the adverse party, and the remedies sought, constitute the subject matter of the litigation. The issues must be presented to the court in substantial compliance with the methods of procedure provided by law, and matters not so presented are not within the active jurisdiction of the court.

Hearing Issues.

Hearing issues embraces all the steps taken in the presentation of the cause to the court and the investigation of all matters of law and fact involved in the litigation. It includes all pleadings by the plaintiff and the submission of himself and his cause to the jurisdiction of the court; the process for, and methods of, obtaining jurisdiction over the person of the defendant; all pleadings by the defendant; all efforts to acquire actual control of testimony, by compelling personal attendance of witnesses; the taking of depositions and procuring and securing documentary evidence; the presentation to the court of all motions and pleadings; the introduction of testimony's argument of the case; and in short, everything done in and by the court to enable it to properly investigate and understand the issues.

Adjudging.

By adjudging is meant the settlement and determination of all questions, both of law and of fact, presented to the court in the trial; the selection and application of the lawful remedies; and the pronouncement of the final, determinate will of the sovereign with regard to the litigation. It includes all rulings by the court, and all findings of fact by court or jury, during the trial and in the final determination of the case. The most important of these adjudications are made in passing on issues of law raised by demurrer, or by objection to testimony, and in cases tried by the judge without a jury, in his findings as to the facts, and his conclusions as to the law, and pronouncing and entering judgment in the cause; and in cases tried by jury, in the charge of the court, the verdict of the jury and the judgment entered thereupon.

Enforcing the Determination.

Enforcing the result comprises the supervision and control over the issuance and execution of all final processes against the person or property of the losing party to which the successful party is entitled in order to make effectual all the rights adjudged to him in the litigation.

POWERS ORDINARILY CONFERRED UPON COURTS.

The creation of a court carries with it, *prima facie*, a grant of each of the three powers enumerated above, so far as their exercise may be proper, in order to enable it to accomplish the purposes for which it is established; and unless there be something in the creative act or acts showing a different intent on the part of the sovereign, all these powers may be exercised by it. While this is the general rule, still a tribunal may be judicial in its character which does not possess all these powers, or a tribunal which possesses all of them, as to some matters, may be authorized to exercise only one, or the other in certain cases as to which the other power or powers are not conferred upon it. A master in chancery or an auditor may be authorized to hear some portions of a case and report the result to the court, without having authority to finally determine anything, and his action in so doing would be judicial in its character. An appellate court may be authorized to hear and consider appeals, and to reverse the judgment and remand the case to the lower court for further proceedings, or to approve the judgment and remand the case to the inferior court for the purpose of enforcing the judgment as approved, and in each instance its action would be, strictly speaking, judicial; or an appellate court may be given the right, under some circumstances, to affirm the judgments of lower courts upon certificate, without reference to the merits, and its action in so doing would also be judicial; yet in neither of these instances is the tribunal clothed by law with authority to exercise all three of the powers enumerated.

DISTRIBUTION OF JUDICIAL POWER UNDER STATE AND FEDERAL GOVERNMENTS.

In a government formed by written constitution, it is almost universally true that no court is established without some fairly definite expression of the will of the sovereign as to the extent of its authority. These bounds, whether expressed or implied, are controlling, and hence the power of every court is restricted; first, as to the issues which it may hear, and the manner of determining them; second, as to the judgments which it may render,—this limitation is affected both by the issues the court may adjudge and the penalties or remedies it may apply; and third, as to the means it may employ to carry its judgments into effect. These limitations may be expressly imposed or they may result from the division of power among several classes of courts in such way as to fairly indicate that the jurisdiction of each class, or of some of them, is exclusive of that of other classes. This division of power may be based upon the character of the subject matter involved in the

suit, or upon the character or status of the parties, or upon territory or locality.

In this State the division is now made almost exclusively with reference to subject matter, and it may be said to be the sole basis of such division so far as original jurisdiction in ordinary cases is concerned. The exceptions, if any, apply only in proceedings of a special nature, such as administration, forcible entry and detainer, etc.

Character or status of the parties to the suit is not much regarded in our State system, though it is still a very important matter in the Federal courts. The Federal Constitution gives the Federal courts jurisdiction over "all cases affecting ambassadors, other public ministers and consuls; * * * controversies to which the United States shall be a party; controversies between two or more States; between a State and citizens of another State; between citizens of different States; * * * and between a State or the citizens thereof and foreign States, citizens or subjects."⁷

This provision and laws passed in pursuance of it are the basis of much of the jurisdiction of these courts, and such jurisdiction is entirely dependent upon the status or citizenship of the parties. This jurisdiction includes some of the most important matters committed to the courts of the Federal government.

Locality is now rarely regarded as a factor in fixing jurisdiction. Formerly it had much more influence in the minds of the lawmakers, and the place where the thing involved in the litigation was situated, or where the cause of action arose, or where the defendant lived was frequently the controlling consideration in granting power to the court to hear and determine the cause. This is no longer true in Texas, and the potential jurisdiction of a court in this State is now rarely made to depend upon a question of locality. While the term territorial jurisdiction is still used, it is, in almost all instances, an incorrect expression for venue. For convenience to the court or to the parties, selection is frequently made among courts having concurrent potential jurisdiction, and one chosen with reference to its locality is fixed upon as that in which the venue in certain suits may be compulsorily laid. Such selection neither adds to the potential jurisdiction of the court so chosen nor takes from that of the others of its class. The selection is nothing more than the designation of one among many courts, any one of which under the law has authority to try the case, as the one in which the parties can be compelled to litigate. If suit be brought in any one of the courts having concurrent jurisdiction and the defendant desires to avail himself of the privilege allowed him by law of being sued in the particular court where the venue is fixed, he must plead his privilege in due order, or it will be lost, and the court in which the suit is brought

⁷ Const. U. S., art. III, sec. 2.

would adjudicate the cause and bind him and the subject matter of the suit. If the defendant does claim his privilege and it is denied him, and he is forced to try the case in the court where it had been brought, such ruling would be error which, upon appeal, would necessitate a reversal of the judgment, but it would not render the judgment void and subject it to collateral attack. Potential jurisdiction is always a question of authority to represent the sovereign. Venue in civil cases is a matter of privilege to parties. To illustrate: The Constitution confers upon the district courts authority to try all cases involving the title to land. This is a grant of exclusive jurisdiction, and no court of any other class can pass upon and adjudge such a case, and any attempt to do so would be void. On the other hand, the statute provides that suits for trial of title to land must be brought in the county where the whole or any part thereof lies. This is fixing venue, and if the suit for the land should be brought in some other county than that in which it was situated, the defendant would have the right to suggest to the court that the venue was improperly laid, and upon such suggestion made in due time, it would be the duty of the court to dismiss the suit, but if it did not do so, its judgment with reference to the title to the land would be binding, and the party dissatisfied with it could only be relieved by appeal or writ of error.⁸

POTENTIAL AND ACTIVE JURISDICTION.

The potential jurisdiction of a court is the right conferred upon it by the sovereign to exercise judicial power. It embraces all matters over which the court is empowered by law to exercise authority. Active jurisdiction is potential jurisdiction in actual operation; that is, the power of the court actually and lawfully applied to some particular subject matter or person. Potential jurisdiction is essential to the court's power in any case; but it lies dormant and accomplishes nothing until it is actively called into exercise as to some particular subject matter embraced within the general grant of power. Active jurisdiction results from the act of the parties in the particular case, or from the act of the particular court, performed at the instance and upon the application of the proper parties, under authority of the sovereign. Potential jurisdiction results from the act of the sovereign alone. It can never be conferred or extended by the act of a party, or by the concurrent act of all the parties, to a litigation. It is prerequisite to the exercise of active jurisdiction. The court is not the agent of the sovereign except in matters within its potential jurisdiction, and this the consent of the parties can neither enlarge nor diminish. The active jurisdiction can not go beyond the poten-

⁸ Chapter X, on "Venue," *infra*.

tial, and it may be much less extensive. Thus, each district court in the State of Texas has potential jurisdiction over all questions involving title to land situated in the State, but no one of these courts can of its own motion determine any abstract proposition of law affecting any such title. Its power lies in abeyance, waiting action by some party at interest by which he shall invoke its exercise in his behalf, but, upon such application by him, this power comes into actual operation as to the particular tract of land subjected to it. If, however, the party should own another tract which was also being trespassed upon in the same manner as the first, invoking the jurisdiction as to the first would in nowise affect the second; as to it the potential jurisdiction would continue to lie dormant, until by some appropriate means the exercise of this power should be requested as to it.⁹

JURISDICTION OVER THE PERSON AND OVER THE SUBJECT MATTER.

Another classification of jurisdiction, based upon the nature of the object upon which it is to operate, distinguishes between jurisdiction over the subject matter and jurisdiction over the person. This is a real distinction and is recognized by all the authorities, elementary and judicial. The former embraces the rights, wrongs, and remedies involved in the litigation; the latter embraces the persons whose interests are sought to be affected by the litigation. This distinction exists in both potential and active jurisdiction; that is, there is potential jurisdiction over the subject matter and active jurisdiction over it; and there is potential jurisdiction over persons and active jurisdiction over them. It is important to keep this constantly in mind, since some confusion of thought, and much confusion of expression, have arisen from failure to do so, and since some of the rules announced with reference to this subject can not be understood and reconciled in any other way. There are numerous well considered authorities that hold as a legal doctrine that consent can not give jurisdiction over the subject matter. If *jurisdiction* here means *potential* jurisdiction, and *give* means to originate or bring into being, the rule is unquestionably correct, for no convention of parties can change the law, and give to an agency of the sovereign authority to represent and act for it without its consent, and an agreement to such effect, in the most solemn form, even if recognized and acted on by the judge, would be clearly ineffectual, and such action void. To illus-

⁹Wynns v. Underwood, 1 Texas, 48; Sutherland v. De Leon, 1 Texas, 309; Able v. Bloomfield, 6 Texas, 263; Chambers v. Hodges, 23 Texas, 112; Hamblin v. Warnecke, 31 Texas, 91; Flanagan v. Pierce, 27 Texas, 79; Ward v. McKenzie, 33 Texas, 315.

trate: If all parties to a controversy regarding an alleged libel should agree that an action therefor should be brought in a county court, such an agreement would be without effect, and the court would have no authority to act thereunder.

But if the reference in the rule be to *active* jurisdiction within the limits of the potential, and by *giving* is meant bringing about conditions authorizing regular and proper exercise, then it would seem the doctrine is incorrect, for upon consent in such case, or even waiver of privilege, a court having potential jurisdiction over the subject matter may properly exercise active jurisdiction over it, which it could not do but for such consent or waiver. In this imperfect sense consent does give jurisdiction over the subject matter. The illustration given above with regard to suits for the recovery of land is directly in point. The statute provides that such suits must be brought in the county where the land or a part thereof, is situated; but it is settled beyond question that such a suit may be brought in the district court of a county where no part of the land lies, and upon agreement of the parties, or even upon the failure to interpose an objection in the proper time and manner, such court must hear and determine the cause.¹⁰

In such case the potential jurisdiction over the subject matter exists, and consent or waiver of parties properly subjects the property to the exercise of active jurisdiction.

Again, there are equally respectable and quite as numerous authorities which say that consent can give jurisdiction over the person. If here the term jurisdiction is used to signify *active* jurisdiction, and *giving* means to bring within the proper operation of, this rule is correct. If there be two or more courts having potential jurisdiction over a party, and the law gives to him the privilege of being subject to the active jurisdiction of only one of them, and he is sued in some other, he may plead his privilege and defeat the exercise of active jurisdiction by that court; but if he consents to be sued there, or even does not insist upon his immunity from such suit in due time, by so doing he loses his privilege and becomes fully subject to the jurisdiction of the court in which the suit is pending, and in this sense has, by consent, conferred jurisdiction over himself upon the court.

But if in this statement jurisdiction means *potential* jurisdiction, and *giving* means originating or bringing into being, so that the rule teaches that consent of parties can originate in a court *potential* jurisdiction as to persons, then, in my judgment, it is incorrect. Unless the law give the court general authority to adjudicate cases between such persons as are parties to the litigation, consent by these persons can not give such authority. Suppose a controversy should arise between two States of the

¹⁰ Rev. Stats. 1895, art. 1194, sec. 14; *Morris v. Runnels*, 12 Texas, 177; *De la Vega v. League*, 64 Texas, 214.

Union, and they should agree that a court of some third State, having jurisdiction over questions of the character of that in dispute between them, should hear and determine the matter; could such agreement confer on such tribunal power to act as a court over these States, and to exercise jurisdiction as such, and bind either of them by the result as by a judgment? This would seem impossible. The proceeding might be good as an arbitration, and the decision binding as an award, but as a judicial proceeding and adjudication it would clearly be a nullity. This is an extreme case, but it shows the correctness of the position.

The true doctrine seems to be that consent can never originate potential jurisdiction over either the subject matter or the person, nor supply the place of it; that such authority comes alone from the sovereign; but that, if potential jurisdiction exists in several courts over the subject matter and the person, but there is a privilege of having the suit brought in some one of them, such privilege, whether based upon subject matter or person, may be waived by the parties, and the court in which the proceeding is brought will be bound by such waiver and must hear and determine the cause. If the rules stated above be understood as follows: That in the one which denies the efficacy of consent the jurisdiction spoken of is potential, and giving means originating; and that in the one which affirms the efficacy of consent the jurisdiction spoken of is active, and giving means properly subjecting to, the whole matter is simple and the rules consistent.

Unfortunately these distinctions are not always kept in mind, and there are a number of authorities which have undertaken to combine these rules, stating them substantially as follows: Consent can not give jurisdiction over subject matter, but can over the person. Confusion is inevitable, because, as we have seen, the words "jurisdiction" and "giving" are used in different senses in the two rules, and in the formula resulting from the combination, they are used as having the same meaning in both. The formula must necessarily be incorrect, therefore, as to one or the other. If potential jurisdiction is meant, and "giving" is originating, it is wrong to say that consent can give jurisdiction over the person; if active jurisdiction is meant, and "giving" means subjecting to, it is incorrect to say that consent can not give jurisdiction over the subject matter.

Presumably one reason that this confusion has arisen, or at least that this distinction has not been kept in mind more clearly, is the fact that in the division of potential jurisdiction among our State courts, little regard, if any, is paid to persons, but the whole division is made with regard to subject matter. So it may be said with fair accuracy that every court in Texas, having original jurisdiction, has potential jurisdiction over all persons within the State, but that no court in the State has such general jurisdiction over all subject matters. As to the latter, the potential jurisdiction of each court is greatly limited. From this condition it results that in almost every instance where the question of jurisdiction as to

subject matter arises, it relates to potential jurisdiction, and the rule, as announced in the particular case, denying the efficacy of consent, is correct; while in almost every case in which controversy as to jurisdiction over the person arises, it relates to active jurisdiction, and the rule as announced in the particular case affirming the efficacy of consent is correct. So the practical working of the rules is not often harmful. It is well, however, to get clear conceptions of the meaning and extent of each.

BOTH POTENTIAL AND ACTIVE JURISDICTION OVER BOTH SUBJECT MATTER AND PERSON REQUISITE.

Leaving out all questions of mere phraseology, it may be stated as an invariable rule that before a court can lawfully hear any case and render a judgment therein, it must have potential jurisdiction over the subject matter, and the parties sought to be bound thereby; and further, to enable it to render a judgment binding personally on the parties, such persons must be subjected fully to its active jurisdiction; and also to enable it to bind any particular thing, such thing must be brought within its active jurisdiction. All persons whose rights in the thing are to be affected in any manner must be notified in some way, though in some cases it is not essential that they be brought fully under the jurisdiction of the court. These matters are fully considered in the subsequent chapter on proceedings *in rem*, *in personam*, and *quasi in rem*.

RECAPITULATION.

Jurisdiction is authority to exercise the judicial function. This function consists in hearing issues, determining and pronouncing the definite will of the sovereign thereon, and executing such will.

Potential jurisdiction is the full extent of authority conferred by the sovereign.

Active jurisdiction is the application of this potential jurisdiction to definite subject matter, things, or persons. It can never extend to matters or persons not embraced in the potential jurisdiction of the court.

Potential jurisdiction can not be conferred either by consent of one party or by agreement of all parties, but must be derived from the sovereign.

Subjection to active jurisdiction may be effected by act of the court, or by voluntary act of the party or parties.

Jurisdiction is divided among the several courts with reference, first, to subject matter; second, to persons; and third, to locality. In our State the division now existing is dependent in a large majority of in-

stances upon the first; in a few instances upon the second; and in very few, if any, upon the third.

Care must be taken to distinguish between venue and territorial jurisdiction. The former is a matter of privilege and may be waived; the latter, in the rare instances in which it exists, is fundamental, and can not be affected by waiver or consent of parties.

CONCURRENT AND EXCLUSIVE JURISDICTION.

Our judicial system consists of a series of different kinds or classes of courts whose jurisdiction is fixed with reference to each other. Commonly each court of every class has the same potential jurisdiction as every other court of its class. Original jurisdiction over the same matter is sometimes, though rarely, committed to courts of different classes or kinds. All courts of the same class, whose potential jurisdiction is the same, are, as among themselves, denominated courts of concurrent jurisdiction. Jurisdiction over such litigation as is committed exclusively to one class of courts is, as between them and courts of other classes, termed exclusive. In the exceptional instances in which courts of different classes have some common jurisdiction, it is said that the jurisdiction of these courts as to such matters is concurrent. To illustrate: All of the district courts of the State of Texas are considered, as among themselves, of concurrent jurisdiction; as considered with reference to justices' courts, each district court is a court of exclusive jurisdiction, for it has no power in common with the justices' courts. District courts and county courts can not correctly be denominated courts of concurrent jurisdiction, for they belong to different classes, and the limits of their jurisdiction are by no means the same; yet as to a few matters they exercise concurrent jurisdiction. Again, when we say that the jurisdiction of the district court to try titles to land in Texas is exclusive, we speak of the whole class of courts known as district courts, and not of any particular tribunal of that class. There are very few instances in which any one court of a class is given exclusive jurisdiction as against the other courts of that class. The Supreme Court of Texas, of course, has exclusive jurisdiction in this sense, because it is the only one of its class; so of the Court of Criminal Appeals. On the other hand, no one Court of Civil Appeals has exclusive jurisdiction as compared with any other Court of Civil Appeals within the State. But it has such jurisdiction when compared with any court of another class or kind.

ORIGINAL AND APPELLATE JURISDICTION.

Another general division of jurisdiction is into original and appellate. The former is the authority to hear and determine cases in the first instance and authoritatively adjudge the issues between the parties and to enforce this judgment; the latter is the power to hear again, for the purpose of correcting errors, cases which have been determined in an inferior court. Appellate jurisdiction is again divided into jurisdiction to try *de novo* and jurisdiction to try upon the record made in the lower court. The former of these is practically a rehearing of the case upon its merits in another tribunal, supposed to be better qualified to administer the law. In such proceeding the same parties must be before the court, and the case must be presented again by original pleadings, and by introduction of testimony, etc., just as on the hearing in the first court. In the latter, the proceeding is strictly revisory and the trial in the appellate court is conducted wholly upon the record as made in the court below, which can neither be taken from nor added to. In the absence of express provisions to the contrary, all presumptions in such cases are in favor of the validity of the judgment appealed from.

JURISDICTION OVER CASES ARISING OUT OF THE STATE.

There would seem to be no proposition more logical than that a law of a State or nation can have no force or effect outside of the territory of such State or nation; and hence that the courts of one government could not take cognizance of rights arising or wrongs committed within another; but here, as often elsewhere, the law prefers justice to logic, and we find that many such rights are recognized and wrongs are redressed. This is done not in obedience to any strict obligation, but as matter of comity. Such jurisdiction is never taken in cases in which it would tend to disturb rather than to promote friendly relations between the respective governments, nor in cases in which the attempt to settle the matter in controversy would be futile.

Owing to the difference in the basis of legal right and duty in contract and noncontract law, different rules are applied in cases arising upon the violation of these rights respectively. As contract obligations grow out of voluntary acts of the parties upon whom they rest, they are almost universally regarded as personal and enforceable against the obligor wherever he may be found. There is, however, one seeming exception which is made in cases of covenants running with lands. These are regarded as appertaining to the land rather than the owner, and hence, though they may be binding upon a nonresident of the government in

which the land is located because of his ownership of the land with which the covenant runs, still the action upon the covenant is regarded as local, and it can only be brought in the State or nation in which the land lies. This exception is, however, confined to cases of covenants technically running with the land, hence contracts regarding land, or the consideration of which was the sale of real estate, or which are incident or pertain to land, do not come within it unless falling within the above class.

Whether a suit for tort can be maintained in the courts of a government beyond whose territory the wrong was committed, is made to depend on the nature of the particular case. Such jurisdiction is never entertained over local actions. It will or will not be entertained over transitory actions, according to circumstances. The definition of these actions given by Judge Cooley is as follows: "If the cause of action be one that might have arisen anywhere, then it is transitory. If it could only have arisen in one place, then it is local. As for example, an action of trespass to the person or for conversion of goods is transitory. But an action for flooding particular lands is local, because the land could only be flooded where it is situated. For the most part the local actions consist of those instituted for the recovery of real estate or for injuries thereto or for easements."¹¹ This definition has been adopted by our Supreme Court.¹² When the property injured is real estate and is situated in the same government in which the wrong is committed it is an almost universal rule that jurisdiction will not be taken of such wrongs by the courts of another State; but when the land is on or near the boundary between two States or countries, and the wrongful act resulting in the injury has been done in one and the land injured lies in the other, more perplexing questions arise. This matter was considered by the Supreme Court in *Armendiaz v. Stillman*.¹³ Both plaintiff and defendant resided in Cameron County, Texas. The plaintiff owned land just across the Rio Grande in Mexico. The defendant placed an obstruction in the river on the Texas side opposite the plaintiff's land, thus throwing the water onto the plaintiff's land and washing away considerable portions thereof. Suit was brought in the District Court of Cameron County, Texas, for the damages. That court dismissed the case for lack of jurisdiction. The Supreme Court in an extensive opinion, citing numerous authorities, reversed the judgment and remanded the case with instructions to the lower court to proceed with the trial. The considerations which led to this judgment were apparently that since both plaintiff and defendant were residents of Texas, and the wrong resulting in the injury was committed within the county in which the suit was brought by one

¹¹ Cooley on Torts, 471.

¹² *Morris v. M. P. Ry. Co.*, 78 Texas, 20, 14 S. W., 228.

¹³ 54 Texas, 623.

citizen of Texas against another, if jurisdiction were denied here, it might upon the same reasoning be denied in Mexico, because of the non-residence of both parties and the extraterritorial locality of the wrongful act, and thus the injured person would be left without remedy.

In *Willis v. Missouri Pacific Railway*¹⁴ the Supreme Court says: "The appellant therefore seeks to maintain in Texas a suit for injuries committed in the Indian Territory, where the right to the action is not allowed her by the common law, nor by the law of the place where the cause of action, if it exists, must have arisen, on the ground that she can, under the laws of this State, maintain such a suit.

"The rules governing suits growing out of torts committed in a locality other than the government where the redress is sought are these, as deducted from the authorities upon the subject: Where the action is transitory and is based on injuries recognized as such by universal law, the suit may be brought wherever the aggressor is found, irrespective of the provisions of the local law, or whether there be any law at all in force at the place where the wrong was committed. Rorer on Interstate Law, pp. 154, 155.

"But where the right of action does not exist except by reason of statute, it can be enforced only in the State where the statute is in existence and where the injury has occurred. That is to say, the cause of action must have arisen and the remedy must be pursued in the same State, and that must be the State where the law was enacted and has effect.

"The principle upon which the doctrine rests is the want of power in a State to give her laws an extraterritorial effect. Our State, in providing that the negligent killing of an individual shall constitute a cause of action in certain of his survivors for damages against the party committing the homicide, is providing only for cases occurring within her own borders. She makes that an actionable tort which was not so before at common law. Within her own jurisdiction the law is changed by reason of this statute, but it remains the same everywhere else; and the death of a husband through negligence of a railroad company, if the injury occurred in the Indian Territory, was no more a cause of action after the passage of our statute than it was before.

"The government exercising authority in the locality where this act was committed is the only one to determine and provide whether or not such an act shall be good ground for suit in behalf of any one, and to name the parties in whom the cause of action shall exist. It is not the mere giving a remedy for a right previously possessed, but it is the creation of a right itself in certain parties which before belonged to no one whatever. Hence it is held in all States having statutes like our own, that the parties named in the domestic statute can not sue in the

¹⁴ 61 Texas, 433 (1884).

State where it was enacted for damages caused by a negligent killing which has occurred in another."

In *Railway Company v. Richards*¹⁵ the Supreme Court used this language: "The sole right the appellee has to enforce the cause of action which accrued to her father is based on the statute of Louisiana. That statute confers a right which before its passage did not exist even in that State, as may be seen by an examination of the cases to which we have referred.

"As that statute can not be operative here, can the right which it gives be enforced in this State?

"There are three classes of cases in which the question may arise as to whether a right given solely by the statutes of one State will be enforced in the courts of another.

"1. Cases in which the right given by the statutes of one State is sought to be enforced in the courts of another, in which laws exist giving a like right under the same facts; and in this class of cases, while there is some conflict of decision, it seems to be generally held that courts of the latter State will recognize and enforce the right given by the statutes of another State. *Dennick v. Railroad Co.*, 103 U. S., 17; *Boyce v. Railroad Co.*, 63 Iowa, 72; *Leonard v. Navigation Co.*, 84 N. Y., 48.

"The facts of the case before us do not bring it within this rule, and it becomes unnecessary to consider what, if any, qualifications are sought to be made to it.

"2. When facts transpire in a State whose laws give no right of action upon them, and an action based upon these facts is brought in another State under whose laws a right of action would exist had the facts transpired within its jurisdiction. In this class of cases it is held that no action can be maintained. Within this class fall the following cases: *Willis v. Railroad Co.*, 61 Texas, 432; *Whitford v. Railroad Co.*, 23 N. Y., 465; *Needham v. Railroad Co.*, 45 Maryland, 41; *Le Forrest v. Tolman*, 117 Mass., 109.

"3. Cases in which a right of action given by the statutes of one State is sought to be enforced in a State whose laws deny the right given by the statutes of another; and in this class of cases it would seem necessarily to follow that the court of the State in which the action is brought would be compelled to follow the law of the State in which it sits, whose laws only has it the power to enforce. This would seem to be true, whether the law of such State affected the right or only the remedy."

These cases are supported by the weight of authority. The distinctions between statutory laws and laws spoken of as "universal," unless this

¹⁵ 68 Texas, 375, 4 S. W., 627.

term be limited to those general principles which make up private international law, does not seem to be based on good reason or principle.¹⁶

TIME AND PLACE.

A court can not exercise its jurisdiction at a time or place not authorized by law.¹⁷

¹⁶ Other Texas cases bearing on the subject are: *Railway Co. v. McCormick*, 71 Texas, 660, 9 S. W., 540 (1888); *Morris v. Railway Co.*, 78 Texas, 17, 14 S. W., 228 (1890); *Railway Co. v. Cullers*, 81 Texas, 382, 17 S. W., 19 (1891); *Railway Co. v. Jackson*, 89 Texas, 107, 33 S. W., 851; *W. U. Tel. Co. v. Phillips*, 30 S. W., 494 (1893); *S. P. Co. v. Graham*, 34 S. W., 135 (1896); *Railway Co. v. Mitten*, 36 S. W., 282 (1896); *W. U. Tel. Co. v. Clark*, 38 S. W., 225 (1896).

¹⁷ *Doss v. Waggoner*, 3 Texas, 515; *Whitener v. Belknap*, 89 Texas, 281, 34 S. W., 594 (1896); *Wilson v. State*, 37 Texas Crim. App., 373, 35 S. W., 390 (1896); *Williams v. Ruetzel*, 29 S. W., 374 (Ark., 1895).

CHAPTER III.

PROCEEDINGS IN PERSONAM, IN REM, AND QUASI IN REM.

We will next consider the three general classes of proceedings which may be conducted in the courts. These are known, respectively, as proceedings *in personam*, proceedings *in rem* and proceedings *quasi in rem*.

DEFINITIONS OF THESE TERMS.

A proceeding *in personam* is one instituted for the purpose of adjudicating some personal obligation between the parties to the suit.

A proceeding *in rem* is one instituted with reference to a particular thing or status for the purpose of binding said thing or determining said status by an adjudication operative against all parties whether named in the proceeding or not.

A proceeding *quasi in rem* partakes somewhat of the nature of each of the preceding. It resembles the first in that it only operates against those persons named in the proceeding, and upon whom some sort of process is served; it resembles the second in that it specifically deals with and binds a certain thing or things. It differs from the first in that it binds the parties named only so far as they are interested in the particular thing or things within the jurisdiction of the court, and from the second in that it binds the thing or things only so far as the persons named as parties are concerned.

PROCEEDINGS IN PERSONAM.

The proceeding *in personam* is the most common form of litigation. It embraces all those suits in which personal rights and duties are directly involved and sought to be conclusively adjudicated. It is essential in such a proceeding that the court should have both potential and active jurisdiction over both the subject matter and parties. This potential jurisdiction is conferred by the sovereign; the active jurisdiction is acquired over the subject matter by the presentation of the issues to the court by the respective parties, and over the parties either by voluntary appearance, as is always the case with the plaintiff, and not infrequently with the defendant, or by compulsion, through the issuance of service or of legal notice in the form required by the law or rules of the

court. By subject matter here is meant the respective rights and duties of the parties, the alleged violations thereof, and the remedies sought. This must be distinguished from the thing or things in which, or with reference to which, these rights and duties exist, or out of which they may have grown. If the latter is brought before the court, or taken into the custody of the law, the proceeding becomes to that extent one *in rem* or *quasi in rem*.

In those instances in which all parties to the suit voluntarily appear, no questions as to the validity of process or the jurisdiction of the court acquired by compulsion arise; but a great many most interesting questions are presented with reference to the effect of service and the powers of the court over involuntary parties.

The rules governing these differ widely according to residence, persons living within the State which authorizes the service being almost unre-servedly within its power, and those without almost entirely beyond it.

Service Upon Residents

Many of the authorities use extremely broad expressions as to the power of the State regarding methods of obtaining compulsory, active jurisdiction over its own citizens in its own courts. It seems that the only restrictions on such power are those included in the extremely indefinite yet comprehensive term "due process of law," and that any method will be sustained which affords the party fair opportunity to appear and defend his interests.¹ The method usually adopted is the issuance of some writ or process, by the clerk or proper officer of the court, running in the name of the sovereign, and directed to some executive officer, requiring him to notify the party of the pendency of the suit and the time and place of its hearing, and to admonish him to appear and defend. Another method is by publication in a newspaper. Another is by issuing process and having it served by some unofficial person who is required to make return under oath. Any one of these forms is sufficient where the party sought to be served is a resident citizen of the State in which the proceeding is had.²

¹ McMullen v. Guest, 6 Texas, 275; Campbell v. Wilson, 6 Texas, 379; Thouvenin v. Rodriguez, 24 Texas, 468; Long v. Brenneman, 59 Texas, 212; Northcraft v. Oliver, 74 Texas, 162, 11 S. W., 1121; Martin v. Burns, 80 Texas, 679, 16 S. W., 1072; Gunter v. Armstrong, 2 C. C. A., 601; Pennoyer v. Neff, 95 U. S., 714; 1072; Gunter v. Armstrong, 2 Texas Civ. App., 601; Pennoyer v. Neff, 95 U. S., 714; Arndt v. Griggs, 134 U. S., 316; Dillen v. Hiller, 39 Kan., 599.

² Rev. Stats. 1895, title 30, chap. 6.

Service Upon Nonresidents.

However powerful a State may be within its own territory, it has no authority or power beyond its own borders. It can not send process into another State or country and acquire jurisdiction for its courts over persons served there. Whether the effort be made by sending its process to some person outside of the State, authorizing him to serve and return it, or by publishing notice in a newspaper within the State where the suit is pending, or within the State where the defendant resides, or in which he may be found, the result is the same.

A court is without power to adjudicate the personal obligations of a nonresident, unless he is served with process within the limits of the State in which the court is held, or voluntarily submits himself to its jurisdiction. Hence until one or the other of these conditions exists, it can not render any personal judgment for or against him.

For many years this was not the theory of the Texas law nor the doctrine of our courts. Early in the history of the State statutes providing for extraterritorial service were passed,³ and personal judgments based upon such service were for many years upheld.⁴ The case of *Pennoyer v. Neff*,^{4a} decided by the Supreme Court of the United States, at the October term, 1877, denied this doctrine, but it was not followed by our State Supreme Court for many years; the case of *Hochstadler v. Sam*,^{4b} rendered in 1889, probably being the first direct recognition of the principles asserted therein. Since that time, however, the holding has been uniform against the validity of such service as a basis for personal judgment.⁵

³ Texas Statutes: Laws of Coahuila and Texas, p. 265 (Act April 17, 1834); Act of May 13, 1846, Hartley's Digest, art. 676; Act of March 16, 1848, Hartley's Digest, art. 813; Rev. Stats. 1879, art. 1230; Rev. Stats. 1895, art. 1230.

⁴ Texas cases before following *Pennoyer v. Neff*: *Grossmeyer v. Beeson*, 13 Texas, 528; *Kitchen v. Crawford*, 13 Texas 520; *Lawler v. White*, 27 Texas, 250; *Wilson v. Zeigler*, 44 Texas, 657; *O'Neill v. Brown*, 61 Texas, 34; *Rice, Stix & Co., v. Peteet*, 66 Texas, 568, 1 S. W., 657; *Davis v. Robinson*, 70 Texas, 396, 7 S. W., 749.

^{4a} 95 U. S., 714.

^{4b} 73 Texas, 315.

⁵ Texas cases following *Pennoyer v. Neff*: *Hochstadler v. Sam*, 73 Texas, 315, 11 S. W., 408; *York v. State*, 73 Texas, 651, 11 S. W., 869; *Sugg v. Thornton*, 73 Texas, 547, 11 S. W., 532; *Harris v. Daugherty*, 74 Texas, 1, 11 S. W., 921; *Northeraft v. Oliver*, 74 Texas, 162, 11 S. W., 1121; *Byrnes v. Sampson*, 74 Texas, 79, 11 S. W., 1073; *Taliaferro v. Carter*, 74 Texas, 637, 12 S. W., 750; *Masterson v. Little*, 75 Texas, 682, 13 S. W., 154; *Kimmarle & Hirsch v. Railway Co.*, 76 Texas, 686, 12 S. W., 698; *Sam v. Hochstadler Bros.*, 76 Texas, 162, 13 S. W., 535; *Fernandez v. Casey & Swasey*, 77 Texas, 452, 14 S. W., 149; *Martin v. Cobb*, 77 Texas, 544, 14 S. W., 162; *Railway Co. v. Whitley*, 77 Texas, 126, 13 S. W., 853; *Taliaferro v. Butler*, 77 Texas, 578, 14 S. W., 191; *Franz Falk Brewing Co. v.*

PROCEEDINGS IN REM.

A proceeding strictly *in rem* is one which deals directly with the status of some thing or person, and in which the judgment rendered is self operative, not requiring any aid from or action by any other agency or person to make it effectual.

We find an illustration of this in proceedings regarding title to real estate. Any suit in which the court is authorized to deal immediately with the land and by its judgment and process operating directly upon it or upon the title to it, to give to the plaintiff the specific relief which he seeks as to the land or his right in it would be a proceeding *in rem* or *quasi in rem*; but a suit in which such direct dealing with the land or title by the court was unauthorized, and in which the remedy provided could be made effectual only by some action of the court upon the defendant personally would be a proceeding *in personam*.

Under the chancery practice, in an action to remove cloud the court has no power to render a judgment directly divesting the defendant of the title or claim of title; but it determines that such divestiture ought to be made and then compels the defendant under severe personal penalties to make a conveyance to the plaintiff. This is a proceeding *in personam*. Under our statutes this circuitous method is abolished and the court is empowered to render judgment directly divesting the defendant of the title and vesting it in the plaintiff. Since no process against the defendant and no act by him is involved in such divestiture, a suit to remove cloud is with us a proceeding *quasi in rem*. The power of direct action and immediate change in the status of the thing or person must exist in the court in every proceeding *in rem* or *quasi in rem*; and in these cases of direct action, the adjudication is binding on all persons who in legal contemplation are parties thereto. In proceedings strictly *in rem* all persons are regarded as parties. All persons interested are notified in the manner prescribed by the rules of the court,—usually by posting notices and publishing them in a newspaper; and as everyone conceiving himself to have an interest in the proceedings can, upon being thus notified, come into the suit, everyone is held to be bound by it.

Admiralty Suits.

Proceedings in admiralty are perhaps the most typical actions *in rem*. Here the proceeding is against the vessel. The court deals with it and

Hirsch, 78 Texas, 192, 14 S. W., 450; Martin v. Burns, Walker & Co., 80 Texas, 676, 16 S. W., 1072; Maddox v. Craig, 80 Texas, 600, 16 S. W., 328; Hardy v. Beaty, 84 Texas, 562, 19 S. W., 778; Hambel v. Davis, 89 Texas, 256, 34 S. W., 439.

with it only. The claims of different parties are made not as against each other, but as against the vessel. If there is a discharge, it is the vessel that is discharged; if there is a condemnation, it is the vessel that is condemned; and upon sale the title of the purchaser becomes absolute against all the world, and the proceeds are distributed among those adjudged by the court to be entitled to them.⁶

Revenue Suits.

Revenue cases furnish another illustration in the seizure of chattels for revenue due upon them. Here no personal obligations are adjudged, and the property itself is regarded as indebted to the government, and is sold in satisfaction of the debt. The amount due the government is retained, and the remainder disposed of as provided by law.⁷

Probate Proceedings.

In some regards the action of a probate court in admitting or rejecting a paper propounded as a will is a proceeding *in rem*. So far as the court deals strictly with the genuineness of the paper and its legality as a will, its action is *in rem* and binding on all parties; but in other regards, that is, as to construction of the will and the rights and liabilities of the parties thereunder, and as to the death of the testator, etc., it is not *in rem*, and is not conclusive and, in some instances, not even admissible as evidence touching the questions.⁸

Divorce Cases.

Every government owes to each of its citizens and *bona fide* inhabitants the duty to determine for him definitely his condition in every important personal, social, and political relation. Acting upon this obligation, most of the States have undertaken to grant divorces and regulate proceedings with reference thereto. In most jurisdictions such proceedings so far as they affect the personal status of the parties are held to be strictly proceedings *in rem*, and binding on all persons. So far as they undertake to determine property rights or to adjudicate any matter,

⁶ Overhill v. Smith, 17 Wall., 95; The Propeller Commerce, 1 Black (U. S.), 580; Penhallow v. Doane, 3 Dall., 54.

⁷ 2 Black on Judgments, sec. 799.

⁸ Steele v. Renn, 50 Texas, 479; 32 Am. Rep., 605; Brown v. Brown, 2 Pick. (Tenn.), 277, 7 S. W., 643; Robertson v. Pickrell, 109 U. S., 608, 3 S. C., 407; 2 Black on Judgments, secs. 635, 808.

except the status of the parties, the proceedings would either be *in personam* or *quasi in rem* according to the circumstances, and must conform to the rules prescribed for such actions. It is universally agreed that if both parties are citizens of the government, or *bona fide* inhabitants thereof for the required time, that jurisdiction exists; and with almost equal unanimity it is held that if neither is a citizen or such an inhabitant that there is no jurisdiction; but there are differences of opinion, and irreconcilable conflicts in the authorities as to the jurisdiction to grant divorces when the parties to the suit reside in different States. It is held by the Supreme Court of the United States, and settled in the State of Texas, that if the plaintiff has been for the time specified by the statute—one year in Texas—a *bona fide* resident of the State, the court has jurisdiction to determine his status and to grant or withhold the divorce, as the law and facts may demand, and that its judgment is binding upon all persons, notwithstanding the facts that the other party may be a nonresident of the State and has only been served by publication, or by some other form of constructive service.⁹ This obligation does not extend to nonresidents, and an attempt by any such person to have his status adjudicated is a fraud upon the court, and such judgments are not valid.¹⁰

Proceedings Affecting Citizenship.

Naturalization proceedings are also regarded as strictly *in rem*.

These will serve as illustrations of the proceedings *in rem*, the first two dealing with material things, the third with the genuineness and legal status of a particular instrument, and the fourth and fifth with the status of *bona fide* inhabitants.

PROCEEDINGS QUASI IN REM.

In a proceeding *in personam*, the court has complete active jurisdiction over both the subject matter and the persons, but has not custody of the thing. In a proceeding *in rem* the court has legal custody of, and complete jurisdiction over, the thing, but not over the persons. In a proceeding *quasi in rem* the court has not complete jurisdiction over either the thing or the persons. It takes the thing into his custody or possession, and deals with it only so far as the interests of the parties

⁹ Hare v. Hare, 5 Texas, 355; Trevino v. Trevino, 54 Texas, 261; Shreck v. Shreck, 32 Texas, 578; Jones v. Jones, 60 Texas, 451; Stephens v. Stephens, 62 Texas, 337.

¹⁰ Gould v. Crow, 57 Mo., 200.

named and proceeded against in the action may be found to extend; and it deals with the parties only as to their interest or claim in that particular thing. A sale of the thing in a proceeding of this sort would not carry with it absolute title, but the title of the parties to that suit, and upon a sale of the thing and an extinguishment thereby of the parties' right in it, the court exhausts its jurisdiction over the parties,—that is, the court neither renders a general judgment of condemnation against the thing, binding on everybody, nor a personal judgment against the party, binding upon him, or upon anything belonging to him, except the *res* before the court.¹¹

Custody of the Thing.

In these proceedings it is necessary that the court should have the legal custody of the thing. This does not always involve actual seizure or possession, but the thing must in every case be brought into such relation to the court that its judgment may act directly on it and bind it. On this the authorities since the decision of *Pennoyer v. Neff*, 95 U. S., 714, all agree.

Service.

Regularity of proceeding requires also that some form of service upon the defendant be obtained. On this subject the authorities are not uniform. The Supreme Court of the United States December Term, 1870, in *Cooper v. Reynolds*,¹² in a very strong opinion by Judge Miller says: "Now in this class of cases [suit on personal obligation with attachment on land, in which the preliminary proceedings in attachment were defective, and no attempt at personal service of any sort was made] on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into court, the power of the *res* is established. The affidavit

¹¹ Texas cases cited supra: *Pennoyer v. Neff*, 95 U. S., 114; *Freeman v. Alderson*, 119 U. S., 187.

¹² 10 Wall., 315.

is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but the writ being issued and levied, the affidavit has served its purpose, and, though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon the defendant's property.

"So also of the publication of notice. It is the duty of the court to order such publication, and to see that it has been properly made; undoubtedly, if there has been no such publication, a court of errors might reverse the judgment.

"But when the writ has been issued, the property seized, and that property been condemned and sold, we can not hold that the court had no jurisdiction for want of a sufficient publication of notice.

"We do not deny that there are cases which, not partaking of the nature of proceedings *in rem*, when the judgment is to have an effect on personal rights, as in divorce suits, or in proceedings to compel conveyance, or other personal acts, in which the Legislature has properly made the jurisdiction depend on this publication of notice, or on bringing the suit to the notice of the party in some other mode, when he is not within the territorial jurisdiction."

The rule of Texas on this subject is very clearly announced by the Supreme Court of Texas in *Stewart v. Anderson*.^{12a} Speaking for the court, Judge Stayton says: "The laws of this State do not deem the seizure of property under a writ of attachment notice, for it requires personal service or notice by publication.

"It is doubtless competent for the Legislature when personal service can not be made within the State of a defendant, to declare what shall constitute notice to a nonresident debtor having property within the limits of the State sought to be subjected by a creditor to the payment of his debt. When, however, the manner in which notice shall be given in such cases is thus prescribed, and the Legislature has declared 'that *no judgment shall be rendered* in suits by attachment, unless the citation or summons has been served in the ordinary mode, or by publication in the manner prescribed for by law,' we can not hold that the giving of notice is not necessary to clothe a court with power to hear and determine the pending cause, if there be no appearance; and without this no court has the power to render a decree or judgment whereby a debtor's property may be sold and the proceeds applied to the creditor's demand, even though the property may be in the custody of the law under a seizure made through a valid writ of attachment.

^{12a} 70 Texas, 590, 8 S. W. 295 (1888).

"There are cases holding to the contrary, and a distinguished elementary writer citing such cases says: 'When, therefore, notice to the defendant is required, it is not an element of the jurisdiction of the court, but is necessary to authorize the court to exercise its jurisdiction by giving judgment in the cause.' Drake on Attachments, 437.

"This is the substance of the language used in some of the decisions holding that notice is not essential to the jurisdiction of a court in attachment cases, and that while judgments rendered in such cases without such notice are voidable, they are not void. The word 'jurisdiction' when used in an inquiry whether a judgment a court has assumed the power to render is void or voidable can have but one meaning, and means lawful power to hear and determine the matter in controversy.

"If having this power a court renders an erroneous judgment it may be avoided by such proceedings as the law provides, but until avoided it is binding on the parties to the action. If the court have not such power, any judgment it may assume to render is necessarily void, and binds no person or thing.

"Courts have no powers other than such as are conferred upon them by law, and the proposition that an exercise of power which the law forbids in the absence of facts made necessary by the law to the exercise and very existence of jurisdiction, is only voidable, can have basis on no theory than that courts have an inherent power to hear and determine when the law denies or withholds it. The great difficulty in determining whether a judgment be void or only voidable most frequently arises from the presumptions indulged from the fact that a court of general jurisdiction has assumed to exercise the power to hear and determine, whereby inquiry is cut off except as the facts on which to make it are found in the record. If, however, from the record, it appears that a fact necessary to confer on the court power to hear and determine a given cause did not exist, it is universally held that its judgment is void.

"Every fact which the law declares shall exist before a court can lawfully hear and determine a cause, is necessarily a jurisdictional fact—an element of jurisdiction in the particular case. A denial of the power to render a judgment is necessarily a denial of the power to hear and determine.

"The exercise or assumption of a power, when a fact necessary to its existence is wanting, is usurpation.

"In an attachment suit the debtor's property is seized and thus brought into custody of the law, but if the debtor be within the reach of the ordinary process of the court, the law declares that he shall be brought into court, by service of such process, before a judgment can be rendered against him, or to subject his property to sale and its proceeds to the payment of his debt. If the record in such a case shows that there was neither service on such a defendant nor appearance by him, it would not be claimed that the judgment was not void, even though it did noth-

ing more than to subject the attached property to its payment. In such a case it would be admitted that an element of jurisdiction prescribed by a positive law was wanting.

"What shall be an element of jurisdiction, except as this may be controlled by constitutional safeguards, is to be determined by the Legislature.

"The same law which makes personal service an element of jurisdiction in attachment suits, as in all others, when this can be had, and thereby in effect denies the sufficiency of the mere seizure and custody of the debtor's property to confer on a court the power to hear and determine a cause, declares, if such service can not be had, that notice shall be given by publication before the court can hear and determine the cause.

"The latter is as clearly an element of jurisdiction as is the former."

There are expressions used by the Court of Civil Appeals at Galveston in *Barelli v. Wagner*,^{12b} which do not at first sight seem to correspond with this extract from the opinion of the Supreme Court, but when the facts in that case and the questions presented are considered, there is no real disagreement.

The following are among the most common instances of proceedings *quasi in rem*.

Suits on Personal Contracts Accompanied by Seizure of Some Thing.

Suits on personal contracts in which process of the court is sued out and levied upon the property belonging to the defendant, thus taking the *res* into the custody of the law and holding it subject to the jurisdiction of the court, are the most common examples. In such a case the jurisdiction of the court attaches to the thing upon its seizure and in Texas a qualified jurisdiction must be obtained over the defendant by some kind of constructive service or process. This may be either by publication or by forwarding notice outside of the State, and having it given in conformity with the statutes.¹³ The power of the court in such a case extends only to the hearing of the plaintiff's case against the defendant, and entering judgment determining the amount due, and ordering a sale of the property seized in satisfaction thereof. This must not be confounded with personal judgment which may be enforced against the defendant or other property subject to execution which he may own. It has no such legal effect; the extent to which it can go is to find, for the purpose of the particular proceeding, the amount of the

^{12b} 5 Texas Civ. App., 499.

¹³ *Harris v. Daugherty*, 74 Texas, 4, 11 S. W., 921.

debt and to order a sale of the property then in the custody of the court; if the property brings more than enough to satisfy the debt as ascertained by the court, the surplus must be held for, and paid to, the defendant. If the property in the custody of the court does not bring enough to satisfy the amount found to be due, no execution can issue to compel payment of the balance from other property, for the power of the court in the premises is exhausted by the disposition of the property in its custody.

Such judgment is not evidence of debt against the defendant either of the whole amount before sale of the attached property, or of the balance after such sale. In these respects the suit differs from a proceeding *in personam*. In the sale of the property, only the defendant's title therein would be conveyed. The interests of other persons not made parties to the suit and not served with process would not be affected thereby. In this respect it differs from a proceeding *in rem*.¹⁴

Defects in matters of form in procuring the attachment, if not called to the attention of the court, or even if the court should erroneously sustain the attachment after the defects were pointed out, and render judgment foreclosing the lien thereby acquired, will not effect the jurisdiction of the court. It is the actual attachment and judgment of foreclosure which give jurisdiction.¹⁵ If, however, the defects were called to the attention of the court and the attachments quashed before the rendering of the judgment, this ousts the jurisdiction and the whole proceeding abates.¹⁶

If the court erroneously enter a personal judgment against the defendant, in addition to the order requiring the sale of the property attached, such personal judgment is void, but the error does not vitiate the judgment dealing with the property.¹⁷

If suit is brought against a nonresident, and constructive service by publication be obtained, and attachment be issued and levied, the plaintiff can not, without new service and attachment, amend his pleadings and set up a new cause of action and take judgment on it; and if he attempt to do so, and, in the judgment, combine the amount claimed in the original cause of action with that claimed in the new, in such way that they can not be separated, the whole judgment is void.¹⁸

¹⁴ Hochstadler v. Sam, 73 Texas, 315, 11 S. W., 408; Scott v. Streepy, 73 Texas, 547, 11 S. W., 532; York v. State, 73 Texas, 651, 11 S. W., 869; Martin v. Cobb, 77 Texas, 546, 14 S. W., 162; Pennoyer v. Neff, 95 U. S., 714.

¹⁵ Barelli v. Wagner, 5 Texas Civ. App., 445, 27 S. W., 17; Cooper v. Reynolds, 10 Wall, 319; Matthews v. Dinsmore, 109 U. S., 216.

¹⁶ Hochstadler v. Sam, 73 Texas, 315, 11 S. W., 408.

¹⁷ Barelli v. Wagner, 5 Texas Civ. App., 445, 27 S. W., 17; Foote v. Sewall, 81 Texas, 660, 17 S. W., 373.

¹⁸ Berry Bros. v. Nelson Davis & Co., 77 Texas, 191, 13 S. W., 578; Goodman v. Henley & Gabberts, 80 Texas, 499, 16 S. W., 432.

If such a suit is brought and attachment be issued and levied, and the defendant subsequently dies, the lien of the attachment is not lost by his death and upon making his heirs parties and giving notice to them, if the facts are not such as to require administration on the estate, the court can proceed to judgment, which will bind the *res* levied on, to the extent of the decedent's interest and that of his heirs inherited from him.

If there is necessity for administration, the lien would continue, but must be enforced through the probate court.¹⁹

The seizure of the thing in these cases is usually under writ of attachment, but the principles would be the same if it were under a distress warrant, or other process issued at the beginning or during the progress of the case. The seizure before judgment is, however, essential to the court's jurisdiction, and unless this jurisdiction has attached at the time of rendering judgment, the adjudication is void, and no final process can be issued on or supported by it.²⁰

Garnishment proceedings instituted against a resident debtor of a nonresident creditor and served upon the debtor, the nonresident creditor being cited by publication, is in Texas good as a proceeding *quasi in rem*, and will bind the nonresident creditor to the extent of the judgment in the garnishment proceeding.²¹

Trespass to Try Title.

Suits brought for specific property within the jurisdiction of the court when the purpose is not to deal with the title in the abstract, nor to compel the defendant to perform some act regarding the property, but for the court to act directly upon the property, as in trespass to try title, are proceedings *quasi in rem*.²²

Partition.

The same is true in partition suits.²³

¹⁹ Stewart v. Anderson, 70 Texas, 590, 8 S. W., 295.

²⁰ Rogers v. Burbridge, 5 Texas Civ. App., 68, 24 S. W., 300.

²¹ Pennoyer v. Neff, 95 U. S., 714.

²² Hardy v. Beaty, 84 Texas, 562, 19 S. W., 778; Sloan v. Thompson, 4 Texas Civ. App., 419, 23 S. W., 613.

²³ Taliaferro v. Butler, 77 Texas, 578, 14 S. W., 191; Foote v. Sewall, 81 Texas, 662, 17 S. W., 373.

Suits to Foreclose Liens.

Suits brought to subject some property specifically named in the pleadings to the payment of a debt claimed to be either a legal or equitable charge thereon, as in foreclosure of liens, also fall in this class.²⁴

Suits to Remove Cloud.

So also do suits affecting the title to property within the jurisdiction of the court, as suits to remove cloud from title, etc., where the court deals directly with the title, and is authorized by law to render judgment passing the title from one party to the other. In cases of this character the nature of the proceeding depends upon the condition last stated,—namely, the authority of the court, by its own act, to deal directly with the title and divest it out of one party and vest it in the other. This power is possessed by the courts in Texas. If this power does not exist, and the court is compelled to deal with the party, and require him to convey the title, as is the case in the chancery courts, the proceeding would not be *quasi in rem* but would be strictly *in personam*, and void, unless there were good service.²⁵

NECESSITY FOR NOTICE.

As stated above, if the proceedings be strictly *in personam*, valid legal service must be had, or appearance made, or judgment can not be rendered that would have any effect upon the rights of a nonresident party. If the proceeding be *in rem* strictly, necessity for personal service does not exist.²⁶ It is usual, however, and certainly the better practice, even here to give some form of notice by posting, etc. If the proceeding be one *quasi in rem*, constructive service according to the law under which the court is held is all that is required in order to the regularity of the proceedings. As seen above, the authorities differ as to whether such constructive service is essential to the legal existence of the jurisdiction, the Supreme Court of the United States holding that under the Tennessee statutes it is not, the Supreme Court of Texas holding that under the Texas statutes it is. These differences are doubtless

²⁴ Heidenheimer, Ex. v. Loring, 6 Texas Civ. App., 560, 26 S. W., 99; Waldorf v. Scott, 46 Texas, 1; Pennoyer v. Neff, 95 U. S., 714.

²⁵ Arndt v. Griggs, 134 U. S., 316; Rev. Stats. 1895, art. 1338.

²⁶ Heidstetter v. Elizabeth Oil Cloth Co., 112 U. S., 294, 5 Sup. Ct. Rep., 135.

due largely to the difference in the statutes under which the proceedings were had.

If in a proceeding *quasi in rem* perfect service should be obtained on the defendant, or he should voluntarily appear, this would give the court full jurisdiction over him, and it could proceed in the case as in one originally personal in its nature.

COSTS.

In proceedings strictly *in rem* the costs of the action must be paid from the proceeds of the property in the custody of the court or by the parties instituting the proceeding.

In proceedings *quasi in rem* the same doctrine is enforced. A personal judgment against the defendant for costs is not only erroneous, *but void*; but costs may be adjudged to be paid out of the proceeds of the property in the custody of the court. The rule is stated thus in *Freeman v. Alderson*^{26a}: "Whilst the costs of an action may properly be satisfied out of the property attached or otherwise brought under the control of the court, no personal liability for them can be created against the absent or nonresident defendant; the power of the court being limited, as we have already said, to the disposition of the property which is alone within its jurisdiction."

This is the rule recognized and enforced in Texas. In some of the cases the language used is general and might make the impression that costs could not be adjudged at all against the nonresident or his property but the real meaning is that no personal judgment can be rendered therefor against the nonresident defendant which will authorize execution against his property. It is not intended to deny the power of the court to adjudge the costs or such part thereof as is properly chargeable to the defendant against the property in the custody of the court, and to satisfy them out of the proceeds of such property.²⁷

^{26a} 119 U. S., 189 (1886).

²⁷ *Taliaferro v. Butler*, 77 Texas, 578 (1890), 14 S. W., 191; *Foote v. Sewall*, 81 Texas, 459, 17 S. W., 373; *Hardy v. Beaty*, 84 Texas, 569, 19 S. W., 778; *Gunter v. Armstrong*, 2 Texas Civ. App., 600, 21 S. W., 607.

CHAPTER IV.

THE DEVELOPMENT OF THE JUDICIAL SYSTEM OF TEXAS.

COMMON AND CIVIL LAW.

The jurisprudence of Texas is in many respects different from that of any other country. It is a resultant of the combined forces of the civil and common law. For centuries these two great systems of jurisprudence have controlled the governments of Southern and Western Europe, the civil law having its sway over the Latin, and the common law, over the Anglo-Saxon and kindred peoples. In connection with them in their several jurisdictions has grown up the splendid civilization of Europe. As these several European nations established their colonies in the New World each colony brought with it the traditions, habits, and character of its parent state; and these influences of the Old World determined, to a large extent, the character of the several social and governmental institutions of the New.

England was a common law country, and in all her colonies, that system was the base of colonial jurisprudence. Spain held most rigidly to the ancient Roman or civil law and that system was the base of the jurisprudence of all her American dependencies. Neither system could be transplanted intact. The natural and social conditions in the two hemispheres were too different, and each code of laws received characteristic modifications, first by those in authority in Europe, and subsequently by the colonists and their descendants. The respective characteristics of the English and Spanish peoples manifested themselves here and the changes in the English common law by the Anglo-Americans were much greater and more fundamental than those wrought by the Spanish-Americans in the Spanish civil law.

Texas furnished a meeting place and battle ground for these two peoples and their institutions. The Spanish-American and the Spanish civil law were in possession of the territory. The invasion was by the Anglo-American and the common law. Between the peoples, the struggle was sharp, short, and decisive. The Anglo-American was victorious. Between the systems of jurisprudence, the contest was protracted and the result a compromise. The common law ultimately prevailed, but its victory involved the loss of some of its most cherished doctrines.

The founders of the government of Texas were free to choose the materials for their structure from whence they would. Their sympathies were with the common law, but the civil law had been in force, and marital relations, land titles, and other rights permanent in their nature

had grown up under it. Sudden and radical changes would have been prejudicial, if not impracticable, and the Texans, in their wisdom, declined to disturb too violently existing institutions. On the contrary, they adopted many of the civil law doctrines, modifying them to suit their purposes and conditions, and retained them as part of the permanent jurisprudence of the country.

Thus it will be seen that our Texas law rests upon the common law of England, as adapted to American conditions by the several States of the Union prior to the Texas Revolution and upon the ancient Roman law, as modified in its transmission through Spain and her American dependencies, and is formed, to a large extent, from selections from each. In most instances, these selections were wisely made and the result is a blending in one homogeneous whole of much that is best in each of the two great sources from which the material was taken.

The peculiarities of the system thus established embrace matters both of substantive and adjective law. The most interesting relate to the first of these divisions—the law regulating substantive rights; but these are apart from our present purpose, which concerns only so much of the adjective law—or law of procedure—as is involved in the development of the judicial system.

This development may be conveniently, though somewhat arbitrarily, divided into two periods—the first extending from the establishment of the Mexican Republic, in 1824, to the annexation of Texas to the United States in 1845; the second extending from annexation to the present time. The first of these periods we may designate as the formative, and the second as the modifying.

CONCEPTION OF A JUDICIAL SYSTEM.

A court may be broadly, though somewhat technically, defined as an agency created by the sovereign to determine rights and apply the sanctions of the law to individual conduct. The aggregate of such agencies, with their co-ordinated powers, existing in any government, constitutes the judicial system of that government. The character of this system depends upon the kind and number of these agencies; and these, in turn, depend largely, though not entirely, upon four considerations: First, the conception held by the sovereign of the purposes to be accomplished by these agencies and the power necessary to be conferred upon them; second, the basis of the distribution of this power among the several agencies; third, the number and kind of officers who are to represent or constitute such agencies; and, fourth, the methods of procedure in such agencies. Other elements enter in but these are the most potent. It would be tedious to attempt to trace the changes in these several re-

gards in the development of our system and no effort will be made to do so. Still it will be well to bear these thoughts in mind as we consider the subject.

TEXAS AS A MEXICAN STATE.

UNDER THE CONSTITUTIVE ACT OF FEDERATION.

As stated above, prior to the revolution in Mexico, the Roman civil law, with its various Spanish modifications, was in force in all the dependencies of Spain in the North American continent. The change of government wrought by the revolution necessitated material changes in its jurisprudence; still this civil law remained as its base. After the overthrow of the usurper Iturbide, the Mexican congress reassembled and adopted the "Constitutive Act of Federation" as the plan of government for the Mexican nation. This act was promulgated January, 31, 1824.

In this federation, Texas was combined with Nuevo Leon and Coahuila, forming the Internal State of the East.¹ This constitutive act denied to the several States the power to adopt permanent constitutions and organize permanent governments until the permanent Federal Constitution should be adopted. In the meantime, the existing State governments were to continue provisionally.² By Decree No. 403, of date May 7, 1824, the Mexican Congress divided the Internal State of the East, separating Nuevo Leon from Coahuila and Texas.³ From this time until the Texas Revolution Coahuila and Texas constituted a State. The first Constituent Congress of Coahuila and Texas met on August 13, 1824, at Saltillo, and by Decree No. 1 declared itself duly installed, and inaugurated the provisional State government.

Section 10 of this Decree is as follows:

"The judicial power shall, for the present, be vested in the authorities by which it is now exercised in the State, and in the administration of justice they shall be governed by the laws in use so far as they are not opposed to the form of government adopted."⁴

This provision continued the former civil law courts.

¹ Art. VII., Constitutive Acts of the Mexican Federation.

² Arts. XXIV and XXV, Constitutive Acts of the Mexican Federation.

³ Legislacion Mexicana, Dublan y Lozano, I, 706.

⁴ Laws and Decrees of Coahuila and Texas, p. 4.

UNDER FEDERAL CONSTITUTION OF MEXICO.

The "Constitutive Federal Government" was superseded by the adoption of "the Federal Constitution of the United Mexican States, sanctioned by the General Constitutive Congress, on the 4th of October, 1894." This Constitution was intended to be permanent. It was modeled, to a large extent, on the Constitution of the United States, although the influence of Spanish and civil law ideas is manifest throughout the instrument. It recognized practically the same division of power between the national and State governments that exists in the Constitution of the United States. The division of the powers of each of these governments into legislative, executive and judicial departments was declared, though the lines of separation are not identical with those obtaining in common law countries, the most noticable difference being in regard to the right of construing the Constitution and statutes. This power was conferred exclusively on the Congress, and no question as to the meaning of the Constitution or a statute, nor of the violation of the former by the latter, could be determined by the courts. If such difficulties should arise they were to be called to the attention of Congress and it was to resolve the doubt; on the other hand, common law courts had for centuries unhesitatingly exercised the power to interpret and construe statutes, and the American common law courts, from the organization of the Supreme Court of the United States, have repeatedly exercised the power of determining the constitutionality of the acts of Congress and of the State legislatures.

The permanent Constitution of the State of Coahuila and Texas was not promulgated until March 11, 1827.⁵ This instrument clearly shows the influence of the various forces then striving for the mastery. It is neither civil law nor common law, but is manifestly a compromise between the spirit of conservatism, holding to the traditions and institutions of the past, and the spirit of innovation, insisting upon the adoption of a government similar to that of the United States of the North.

Under this Constitution, until 1832, the State Congress was to consist of twelve deputies, only two of whom were to be from Texas, the other ten having an exclusively Mexican constituency. The first Congress assembled on July 1, 1827,⁶ and the first governor was inaugurated on August 1, 1827.⁷

⁵ Laws and Decrees of Coahuila and Texas, p. 343.

⁶ Id., p. 47.

⁷ Id., p. 63.

Judiciary Title in Constitution of 1827.

The judiciary title of this Constitution consists of thirty-four articles.* The system of courts contemplated by it was composed of the inferior tribunals theretofore existing and a Supreme Court to sit at the capital having jurisdiction of appeals from the more important inferior courts throughout the State. In this system of courts was vested all the judicial power. No special tribunals were to be created, and no retroactive laws were to be passed, but all proceedings were to be uniform, according to pre-established rules and to the written Constitution. The military was subordinated to the civil authorities. The courts were forbidden to construe or pass on the validity of any constitutional provision or statute, the determination of all such matter being vested exclusively in Congress. Attempt to arbitrate was made a condition precedent to the right to litigate, except in special cases. No indictments were required in criminal prosecutions. Petty offenses were dealt with summarily without formal trial or right of appeal. In more serious violations of the law, the accused might be arrested and detained for forty-eight hours without formal charges, but if no such charges were made within that time, he was required to be released. Prosecutions and trials were to be public. Confiscation, torture, and compulsion were forbidden; seizures and searches were declared unlawful, except in specified cases, and must then be made in conformity to law.

Article 192 is worthy of reproduction; because it is the first mention of a jury in any law ever in force throughout Texas territory; and also because it indicates the attitude of Congress and the people in reference to this institution. It is as follows: "One of the main objects of attention of Congress shall be to establish the trial by jury in criminal cases, to extend the same gradually, and even to adopt it in civil cases in proportion as the advantages of this valuable institution become practically known."

The contrast between its doubtful and experimental tone and the vigorous and imperative language of the Anglo-American constitutions on this subject is sharp and clear. The spirit of doubt and indecision expressed in the article dominated those charged with its enforcement, and no active steps were taken to begin the experiment of trial by jury for several years.

* Laws and Decrees of Coahuila and Texas, p. 337.

First Texas Jury Law.

On September 1, 1830, was passed Decree No. 136, of the laws and decrees of Coahuila and Texas,⁹ relating to trial by jury. The substance of this decree is as follows: The ayuntamiento in each district capital was to select yearly from among the citizens of the district from twenty-one to eighty-four jurors, who should possess the same qualifications as members of the ayuntamiento. The persons so selected were to be the jurors for one year. The preliminary examination of criminal offenses was to be conducted as theretofore by the primary courts of justice, but whenever the evidence introduced satisfied the primary judge that the crime was proved, he was to desist from further investigation of the case, and send the prisoner and the proceedings had before him, to some alcalde of the capital of the district. The proceedings were to be continued before this alcalde who should at once require the prisoner to choose his counsel, and immediately thereafter the trial should begin. The prisoner then selected from the list of jurors seven to sit in his case. The prosecution could make objection to two jurors, provided this was done within twenty-four hours after they were chosen. The places thus made vacant were to be filled by selection by the prisoner from the other jurors. The seven jurors were then to be notified by the alcalde and were to meet within four days and were to be sworn to try the case. From these jurors a secretary and a fiscal were to be selected. The fiscal thus selected was to make an examination of the proceedings up to that time and form a "recapitulation" thereof, and express his opinion as to the guilt or innocence of the prisoner. For this he was allowed eight days, and immediately thereafter the jury was to meet again publicly, and the proceedings and recapitulation were to be read in the presence of the prisoner and his counsel, and the record was to be delivered to them, and upon the sixth day after such delivery the jury was to reassemble and proceed with the investigation, having the right to examine the prisoner and his counsel. The case was then to be discussed by the jury until all of them signified that they were prepared to vote. Each juror was then to vote by ballot, signifying his judgment as to the guilt or innocence of the prisoner, and if he believed him guilty specifying the punishment to be inflicted. If a majority concurred in the innocence of the prisoner he was acquitted; if a majority concurred in his guilt and as to the punishment, he was adjudged guilty, and the punishment was fixed as specified in the ballots. If a majority found him guilty, but differed as to the punishment, the question of punishment was reconsidered until a majority should agree on it. If the prisoner were ac-

⁹ Laws and Decrees of Coahuila and Texas, p. 151.

quitted this ended the proceedings; if he were found guilty judgment could not be pronounced in that tribunal, but all the proceedings were passed to the first hall of the tribunal of justice, which was required to pass upon the question of punishment, and if the punishment as fixed by the jury was moderated or approved, judgment to that effect was rendered by the court, and from this no appeal could be taken. If, however, this tribunal should increase the punishment as fixed by the jury, an appeal lay to the second hall of the tribunal of justice. If this second appellate court concurred in the increase of the punishment this should be final. In case the punishment assessed were capital an appeal lay to the tribunal of justice, composed of all three halls of the supreme court.

This law had no application to civil cases, and is so essentially different from all common law ideas of juries in criminal cases that it emphasizes very greatly the predominant influence of civil law in our jurisprudence at that time.

Decree No. 39.

On page 60 of the Laws and Decrees of Coahuila and Texas, as published authoritatively in Texas in 1839, appears this title:

“DECREE NO. 39.

“LAW FOR THE REGULATION OF JUSTICE.”

Neither text nor date appears. The next preceding decree is dated June 20, 1827, and the next succeeding June 22, 1827. References to this decree in other portions of the laws of Coahuila show it to have been an enactment of some length, evidently designed to meet the conditions in the Mexican portion of the State rather than in Texas. An unofficial copy to which I have had access shows, that there was nothing in the decree which relates to juries or which has left any permanent impression on our judiciary.

Chambers Jury Law, Decree No. 277.

On April 13, 1834, was passed Decree No. 277, commonly known as the “Chambers Jury Law.” It comprised an hundred and forty articles, extending from page 254 to page 270 of the Laws and Decrees of Coahuila and Texas. It is extremely interesting and instructive, but its length forbids its reproduction. Its title and preamble are as follows:

"DECREE No. 277.

"The Constitutional Congress of the free, independent and sovereign State of Coahuila and Texas, desirous to provide for the happiness and prosperity of their constituents, and to comply with the obligation imposed upon them by the 192nd article of the Constitution, decree the following:

"A plan for the better regulation of the administration of justice in Texas."

The article of the Constitution referred to is the one quoted above.

This act was to be operative in connection with the Constitution, and the courts provided by it were to be subordinate to the Supreme Court. So the Texas system, after its passage, consisted of the Supreme Court of Coahuila and Texas, as created by the Constitution and statutory courts provided for by this act.

These statutory courts consisted of, first, a superior court of Texas, to be presided over by a superior judge, with a circuit comprising the whole of Texas, which was divided into three districts, namely, Bexar, Brazos, and Nacogdoches, in each of which the superior judge was to hold court three times each year at designated times and places; second, courts of less jurisdiction, in each municipality, to be held by a primary judge; and, third, still inferior courts in the smaller political subdivisions. This act was, by its terms, exclusive, and undertook to supplant all courts theretofore existing in Texas. In most cases submitted to them the decisions of the lowest courts were final. The primary courts had no jurisdiction to try criminal cases except the most trivial misdemeanors; but the primary judges had extensive powers as examining and committing magistrates. In civil matters, however, the jurisdiction of the primary courts was very extensive. They had exclusive original jurisdiction of all suits involving more than ten dollars in value, without regard to the nature of the litigation. The decision in all such cases was final, unless appeal was prosecuted to the superior court. The superior court had exclusive original jurisdiction in all criminal cases, except the smallest misdemeanors, and appellate jurisdiction in all civil cases tried in the primary courts. Appeal lay from all judgments of the superior courts to the Supreme Court of the State.

The procedure in these courts was not regulated by the rules either of the civil or common law, but was peculiar to itself. The general provisions regarding juries are important enough to quote:

"Art. 2. All cases, civil and criminal, shall be tried by juries in the manner and form prescribed by this law."

"Art. 6. For the trial of civil causes, there shall be in every municipality a tribunal for each primary judge, composed of the judge, a

subaltern sheriff, and the jury. Their sessions shall be held every two months of the year."

"Art. 7. In all causes, civil and criminal, the jury shall be composed of twelve men, who shall be sworn, and the joint opinion of eight of them shall be considered the decision of the jury."

"Art. 24. Juries are the judges of all the facts in controversy, and all the laws concerning evidence, subject to the instructions from the judge, but they have the right to differ with him in opinion; but in regard to all other laws, they shall be regulated strictly according to their literal tenor.

"Art. 25. The facts established by the decision of the jury shall be considered as conclusive, and can not be controverted before any tribunal or authority, except in the single case of the corruption of the jury."

"Art. 72. The judge shall make such observations upon the evidence and facts adduced on the trial as he may think proper and necessary for the instruction of the jury, who shall retire for deliberation."

"Art. 74. The verdict of the jury being agreed upon by the number required by law, it shall be committed to writing, expressing all the important circumstances that may have been established by the evidence, and shall be signed by all the jurors. Those, however, who may dissent from the verdict, shall be permitted to express their separate opinion."

It is readily apparent that the jury contemplated by this act was a very different institution from the common law jury, or that with which we are now familiar. No provision is made for a grand jury.

The petit jury decided questions of law and fact, both as to the admission of evidence and its legal effect. The verdict could be rendered by eight or more jurors, and the minority could file dissenting opinions. The verdict was conclusive upon the court in which it was returned, and all appellate courts, except in the one case of the corruption of the jury.

There were numerous other differences between the procedure provided for these courts and the practice in the courts with which the Anglo-Americans had been familiar. Probably the most noticeable is the absence of recognition of the common law distinction between legal and equitable rights and remedies, and the giving of one tribunal jurisdiction of all causes, without regard to that distinction. Another is the requirement of an attempt to arbitrate as a condition precedent to suit; another is the provision as to pleading. Here the contrast is so great that I quote a few paragraphs as follows:

"Art. 94. In order to commence an action in writing, the complainant shall present himself before the primary judge of the respective jurisdiction, and shall signify his demand by a petition, plainly and clearly expressed, accompanied by a certificate of having attempted in vain a conciliation with the opposite party, and without this requisite the demand shall not be admitted."

"Art. 101. Neither of the parties shall be permitted to present more

than two writings; and the term of three days shall be allowed for the replica, counted from that of the contestation; and the same time shall be allowed for the duplica, counted from that of the replica; and the judge shall deliver these documents to the parties to whom they may respectively appertain immediately on receiving them."

The superior court contemplated in this act was never organized in any of the three districts, and no session of such court was ever held; hence, this first attempt to establish a Texas judicial system was of little, if any, practical effect.

REVOLUTIONARY PERIOD.

The state of the country was too unsettled to permit of orderly proceedings in any department. The causes which culminated in the Texas revolution were actively at work, and the attention of all parties was filled with other things than private litigation. Theoretically, this law remained in force until the meeting of the Consultation at San Felipe de Austin, on October 15, 1835, and the establishment by it of the provisional government, consisting of a governor, lieutenant governor, and council, who were authorized to administer the affairs of state.

PROVISIONAL GOVERNMENT.

This consultation did not declare nor contemplate national independence for Texas; it strove to accomplish the restoration of the Mexican National Constitution of 1824. The plan of provisional government agreed upon conferred almost absolute power upon its officers acting as a council.

This council was to exercise the power of courts of admiralty and maritime jurisdiction. It was especially required to organize a provisional judiciary.

The three articles relating to the latter, are as follows:

"Art. 5. There shall be constituted a provisional judiciary in each jurisdiction represented, or which may hereafter be represented in this House, to consist of two judges, a first and second, the latter to act only in the absence or inability of the first, and to be nominated by the Council and commissioned by the Governor.

"Art. 6. Every judge, so nominated and commissioned, shall have jurisdiction over all crimes and misdemeanors recognized and known to the common law of England; he shall have power to grant writs of *habeas corpus* in all cases known and practiced to and under the same laws; he shall have power to grant writs of sequestration, attachment, or arrest, in all cases established by the 'Civil Code' and 'Code of Practice'

of the State of Louisiana, to be regulated by the forms thereof; shall possess full testamentary powers in all cases; and shall also be made a Court of Records for conveyances which may be made in English, and not on stamped paper; and that the use of stamped paper be, in all cases, dispensed with; and shall be the 'Notary Public' for their respective municipalities; all office fees shall be regulated by the Governor and the Council. All other civil proceedings at law shall be suspended until the Governor and General Council shall otherwise direct. Each municipality shall continue to elect a sheriff, alcalde, and other officers of *Ayuntamientos*.

"Art. 7. All trials shall be by jury, and in criminal cases the proceedings shall be regulated and conducted upon the principles of the common law of England; and the penalties prescribed by said law, in case of conviction, shall be inflicted, unless the offender shall be pardoned, or fine remitted; for which purpose a reasonable time shall be allowed to every convict to make application to the Governor and Council."

In these ordinances is the first Texas recognition of the English common law. By them it was adopted as the law in all criminal cases. Judicial functions were, however, suspended in all civil matters, except in cases of special emergency, and as to these, the codes of Louisiana—another civil law country—were adopted. The Council was authorized to order the opening of the courts for the trial of civil cases, if, in its discretion, this should be expedient.

Having elected a Governor and Council, the Consultation committed the government to them, and adjourned on November 14, 1835, to meet on March 1, 1836. The Council organized and took charge of the government. From time to time, judges for the different municipalities were elected and inducted into office. On January 16, 1836, the Council passed an act entitled "An Ordinance and Decree for Opening the Several Courts of Justice, Appointing Clerks, Prosecuting Attorneys, and Defining Their Duties, etc.," which was approved January 22, 1836. This is too long for insertion. Its most important provisions were: first, to open the courts for civil as well as criminal business; second, to reiterate the terms of the executive ordinance, adopting the common law of England in all criminal matters; third, to specially provide for grand juries; fourth, to continue the authority of the Louisiana codes in the special cases mentioned in the executive ordinances; fifth, to continue in force the former laws of Coahuila and Texas in all other civil matters; sixth, to authorize appeals from the decision of the primary court in any municipality to the like court in any adjoining municipality; and, seventh, to increase the jurisdiction of *alcaldes* to cases involving as much as fifty dollars.^{9a} The most striking peculiarity of this plan is the absence

^{9a} Orders and Decrees of the General Council, p. 135.

of any court of last resort, without which uniformity of decision is unattainable. As the plan, however, was only temporary, this omission was no serious defect.

The Provisional Government, though embarrassed by much internal strife, and the disordered condition of the country, sustained itself against the hostile invasions from Mexico. Difficulties increased, and the Council decided that it was proper that the Convention, which was to assemble on March 1, 1836, should be more thoroughly representative than the adjourned Consultation, and on December 10, 1835, it passed an ordinance providing for an election, to be held throughout the state, on February 1, 1836, to select delegates to such a body, to meet at Washington.¹⁰ The Governor objected to some of the provisions of this act, and vetoed it, but on the succeeding day it was passed over his opposition.¹¹ The ordinance calling for this election is not set out in the journals of the Council. The preamble to the journal of the Convention gives the date of the passage of the ordinance as December 11th, and of its approval by the Governor as December 13th. The dates given herein are taken from the journals of the Council. The election for delegates was duly held.

GOVERNMENT AD INTERIM.

The Convention assembled at Washington on March 1, 1836, and immediately organized. On the next day it adopted the Texas Declaration of Independence, and proclaimed the Republic of Texas a free, sovereign, and independent nation. In this new nation, the Anglo-American element was overwhelmingly predominant, and its traditions, sympathies, and prejudices were all in favor of the common law. One of the grievances of the people against the Mexican government, as set forth in this Declaration of Independence, is in these words:

"It has failed and refused to secure on a firm basis the right of trial by jury, that palladium of civil liberty, and that only safe guarantee for the life, liberty, and prosperity of the citizen."

It was necessary to form a Constitution as a basis of permanent national existence, and as no vote of the people could be taken on it then, or in the near future, and as the provisional State government had been superseded, it was necessary to make provision for a temporary national government. The Convention addressed itself vigorously to these several tasks, and on March 16th adopted an executive ordinance providing for a Government *ad interim*, and on March 17th passed unanimously, and signed the Constitution of the Republic of Texas; and, having elected

¹⁰ Proceedings of the General Council, p. 101.

¹¹ Id., p. 112.

officers for the temporary government, adjourned without day. As men who could bring things to pass, the members of that Convention stand without peers. The swiftness of their work is equaled only by its quality and effectiveness.

The executive ordinance thus adopted, is as follows :

"WHEREAS, We, the people of Texas, through our delegates, in General Convention assembled, for the purpose of framing a Constitution, and organizing a government under that Constitution, free, sovereign, and independent; and finding from the extreme emergency of the case, and our critical situation, that it is a duty that we owe to our fellow citizens and ourselves, to look upon our present danger with a calmness unruffled and a determination unsubdued; and at the same time to pursue a prompt and energetic course for the support of our liberty, and the protection of our property, and our lives; therefore,

"1st. *Resolved*, That we deem it of vital importance to forthwith form, organize, and establish a government *ad interim*, for the protection of Texas, which shall have full, ample, and plenary powers to do everything which is contemplated to be done by the General Congress of the people, under the powers granted to them by the Constitution, saving and excepting all legislative and judicial acts.

"2nd. *Resolved*, That said government shall consist of a chief executive officer, to be styled the President of the Republic of Texas; a Vice-President, Secretary of State, Secretary of War, Secretary of the Navy, Secretary of the Treasury, and Attorney-General, whose salaries shall be fixed and determined by the first Congress of the Republic.

"3rd. *Resolved*, That all questions touching the powers hereby confided to these officers shall be decided by a majority of said officers.

"4th. *Resolved*, That the President be elected by this convention; and that the candidate or the individual having the majority of the whole number of votes given in, shall be, and is hereby, declared to be duly elected.

"5th. *Resolved*, That the Vice-President, the aforesaid Secretaries and the Attorney General be elected by this Convention, a majority of the whole number of votes being requisite to a choice.

"6th. *Resolved*, That the members of this body vote for the above named officers *viva voce*."

The government thus inaugurated was not state but national, embodying all the attributes of sovereignty. Actual hostilities were then going on, and naturally more attention was given to the executive department, than to either the legislative or judicial. The only reference to either of the latter in the ordinance is to deny to the government *ad interim* the power to exercise their respective functions. The change in the government growing out of the substitution of national for state sovereignty was fully recognized in the Constitution of the Republic; but no provision conforming the existing judiciary to such change was made

in the executive ordinance for the government *ad interim*, and President Burnet and his cabinet found themselves without courts authorized to deal with national or international matters. Several vessels were captured, and it became a very practical and perplexing question as to who should deal with these prizes, and determine the questions of maritime and international law arising. The difficulty, and the steps taken to meet it, are given quite graphically in the first message of President Burnet to the First Congress of the Republic, October 4, 1836,¹² as follows:

"The judicial department of the government is in a very imperfect state. By the Constitution, the old system is abolished, and an entirely new judiciary is created; but it was not considered advisable by the executive government to make any further innovations upon the established course than necessity imperatively demanded. The courts were closed to civil business, and they were thought to be adequate to the conservation of the public peace of the country; but I am apprehensive that that opinion is illusory, and that a more energetic administration of criminal law is indispensable. The increase is an invariable concomitant on increase of population.

"Under the existing system, there was no tribunal in the country vested with maritime jurisdiction, and consequently none competent to adjudicate questions arising from captures on sea. Some prizes had already been taken, and it was due to the character of our navy and the country that a regular and lawful disposition should be made of them. The government, therefore, concluded to appoint a district judge for the district of Brazos, within which it was probable all prizes then taken would be brought, or to which they could easily be transported. I accordingly appointed Benjamin C. Franklin, Esquire, to that office. It remains to the wisdom of Congress to determine how soon the new organization shall be perfected."

The exact date of this appointment is not given. This action in effect anticipated the adoption of the Constitution of the Republic, and gave Judge Franklin the powers and jurisdiction of a district judge under that instrument. His appointment, and the value of his services, were recognized by Congress, which made an appropriation for the payment of his salary.¹³

On July 23, 1836, the government *ad interim* ordered an election to be held on the first Monday in September for the adoption or rejection of the Constitution of the Republic, and the election of officers thereunder. The Constitution was adopted.

¹² Journal House of Representatives of First Congress, pp. 17 and 18.

¹³ Acts of First Congress, p. 276.

REPUBLIC.

JUDICIAL SYSTEM UNDER REPUBLIC.

The system of courts ordained in the Constitution of the Republic consisted of, first, one Supreme Court with appellate jurisdiction only, composed of a chief justice and the several district judges throughout the State, as associate justices; second, district courts, which had exclusive original jurisdiction in all admiralty and maritime cases, in all cases against ambassadors, public ministers, and consuls, of all criminal cases punishable with death, and original jurisdiction in all civil cases, when the matter in controversy amounted to one hundred dollars, or more; third, county courts, one in each county; and fourth, justice courts in the smaller political subdivisions. The jurisdiction of the district court, except as indicated above, was not exclusive, and the jurisdiction of the inferior courts was not fixed by the Constitution; so that the divisions of jurisdiction among these courts was left largely to Congress.

Congress at once set to work to bring governmental order out of the existing chaos and to provide for the establishment and maintenance of all the instrumentalities necessary to this purpose. The judicial department received its full share of attention, and acts were passed organizing and fixing the jurisdiction of the system of courts contemplated by the Constitution. As the first Texas legislation by the Anglo-Americans on this subject these acts are important and still interesting.

Supreme Court.

The act organizing the Supreme Court passed December 15, 1836. Some of its sections are as follows:

"Section 1. Be it enacted by the Senate and House of Representatives of the Republic of Texas in Congress assembled:

"That there shall be established in this Republic a court to be styled the Supreme Court of the Republic of Texas, which court shall consist of one supreme judge, to be styled the Chief Justice; to be elected by joint vote of both houses of Congress, and such judges as shall be elected judges of district courts, who shall continue in office during the time prescribed by the Constitution. The Chief Justice shall receive a salary of five thousand dollars per annum, payable semi-annually at the treasury of the Republic.

"Section 2. The Supreme Court shall be held annually at the seat of government, on the first Monday in December, and a majority of all the judges shall be necessary to constitute such a court."

"Section 3. The said Supreme Court shall have jurisdiction over, and shall hear and determine all manner of pleas, complaints, motions, causes and controversies, civil and criminal, which may be brought before it from any court in this Republic, either by appeal or other legal process, and which shall be cognizable in said Supreme Court according to the Constitution and laws of this Republic: *Provided*, That no appeal shall be granted, nor shall any cause be removed into the Supreme Court in any manner whatever until after final judgment by decree in the court below, except in cases particularly provided for by law."

"Section 4. When, by appeal or in any other manner permitted by law, the judgment, sentence, or decree of the court below shall be reversed, the Supreme Court shall proceed to render such judgment, or pronounce such sentence or decree as the court below should have rendered or pronounced, unless it be necessary, in consequence of the decision of the Supreme Court, that some matter of fact be ascertained, or some damages be assessed by a jury, or when the matter to be decreed is uncertain, in either of which cases the suit, action or prosecution, as the case may be, shall be remanded to the court from which it was brought for a more definite decision."

"Section 8. The said court, or any judge thereof, in vacation, may grant writs of injunction, *supersedeas*, and such other writs as the laws permit to the judgments or decrees of the county or district courts, on such terms and conditions as the laws may prescribe in cases of appeals, and also to grant writs of *habeas corpus*, and all other remedial writs and processes granted by said judges by virtue of their office, agreeably to the principles and usages of law, returnable as the law directs, either to the Supreme Court or to any judge of said court, as the nature of the case may require."¹⁴

District Courts.

The jurisdiction of the district court was defined by act approved December 22, 1836, as follows:

"Section 4. The district courts in the several counties of the Republic, shall have original jurisdiction of all suits of whatsoever nature or description, when the matter in controversy shall be one hundred dollars or upwards, and which are not especially cognizable in some court established by law; and shall have power to hear and determine all prosecutions in the name of the Republic, by indictment, information, or presentment for treason, murder, and other felonies, crimes and misdemeanors, committed within their respective jurisdictions, except such as may be exclusively cognizable before a justice of the peace, or in some other

¹⁴ Acts of First Congress, p. 79.

court of this Republic; and shall, in criminal cases, have and exercise all the powers incident and belonging to a court of oyer and terminer and general jail delivery, and generally to do and perform all other acts lawfully pertaining to a district court of this Republic. And the judges of said courts, and each of them, either in vacation or term time, shall have authority to grant writs of *habeas corpus*, *mandamus*, injunction, *super-sedeas*, and all other remedial writs known to the law, not repugnant to the Constitution, returnable according to law, into the Supreme Court, or either of the said district courts, as the case may be."

The provisions relating to appeals was as follows:

"Section 15. Any party may appeal from any final judgment or decree of any district court, during the term at which the decree was rendered, to the Supreme Court, provided the amount in controversy amounts to three hundred dollars, upon entering into bonds and security, to be approved of by the court, in double the amount of the debt or damages in the said suit, for prosecuting the same with effect, or performing the judgment, sentence or decree, which the Supreme Court shall make or pass thereon, in case the applicant shall have the case decided against him."¹⁵

County Courts.

The organization and jurisdiction of the county court was provided for by act approved December 20, 1836, as follows:

"Section 1. Be it enacted by the Senate and House of Representatives of the Republic of Texas in Congress assembled:

"That there shall be established in the several counties of this Republic an inferior court of law which shall be styled the county court of the county of ———, to be composed of one chief justice, who shall be elected by joint ballot of both houses of Congress, and shall hold his office for a period of four years, and two associate justices, who shall be selected by a majority of the justices of the peace of each county, from among their own body, at the beginning of each and every year, and the justices so elected shall attend the county courts, or pay a fine to be assessed by the chief justice not exceeding one hundred dollars."

"Section 6. The several county courts of this Republic shall have original jurisdiction of all suits and actions for the recovery of money, founded on any bond, bill, promissory note, or other written contract, covenant or agreement whatsoever, or any open account where the sum shall exceed one hundred dollars, and shall have concurrent jurisdiction with the district courts in such suits and actions: *Provided*, that no suit relative to the title of land shall be tried and determined in said court,

¹⁵ Acts of First Congress, p. 198.

and generally to do and perform all other acts, and exercise all other powers, lawfully pertaining to a county court within this Republic."

"Section 24. The chief justices of the county court shall be judges of probate for their respective counties, shall take the probate of wills, grant letters of administration of the estates of persons deceased, who were inhabitants of or residents in said county, at the time of their decease, shall appoint guardians to minors, idiots, and lunatics, and in conjunction with the associate justices, shall examine and settle the accounts of executors, administrators, and guardians; and said chief justice shall have full jurisdiction of all testamentary and other matters appertaining to a probate court within their respective counties."

In addition to the jurisdiction thus conferred, these courts had supervision and control of the business matters of the county, roads, etc., such as our county commissioners now have.

The provisions relating to appeals are as follows:

"Section 13. Any party may appeal from any final judgment or decree of any county court, provided the amount in controversy shall exceed two hundred dollars, to the district court for said county, in the same manner and under the same restrictions as provided in the sixteenth section of 'an act establishing the jurisdiction and powers of the district court,' and the forty-second section of the aforesaid act, shall apply equally to the county courts, so far as is consistent with this act."

"Section 26. Any person may appeal from any decision or decree of any court of probate, within ten days after such decision or decree shall have been rendered, to the district court of the county, provided such appellant shall give bond with good and sufficient security, to be approved by said court of probate, conditioned that said appellant shall prosecute said appeal to effect, and perform the sentence, judgment, or decree which the said district court shall make therein, in case the cause be decided against said appellant."¹⁶

Justice's Courts.

The justices of the peace had large power as committing magistrates, but seem to have had no power to finally try any criminal case.

Their jurisdiction in civil cases was as follows: "Justices of the peace shall have jurisdiction of all suits and actions for the recovery of money on any account, bond, bill, or promissory note, or other written contract, covenant, or agreement whatsoever, or for specific articles, where the sum demanded does not exceed one hundred dollars."¹⁷

¹⁶ Acts of First Congress, p. 147.

¹⁷ Id., p. 141.

Partial Introduction of the Common Law.

Section 13 of the judiciary article of the Constitution is: "Congress shall, as early as possible, introduce by statute the common law of England, with such modifications as our circumstances, in their judgment, may require, and in all criminal cases the common law shall be the rule of decision."

In obedience to this mandate, the First Congress incorporated in the judiciary legislation of its first session, the following article:

"The common law of England, as now practiced and understood, shall, in its application to juries and to evidence, be followed and practiced by the courts of this Republic, so far as the same may not be inconsistent with this act, or any other law passed by this Congress."¹⁸

Thus, on these two important branches of the adjective law, evidence and trial by jury, the civil law and prior statutory provisions were superseded, and the rules of the common law, to which the citizens had been accustomed, were introduced.

Pleadings Under This System.

Other common law methods of procedure were not adopted. The few years of their experience with the administration of justice in all civil cases in one court, even under the very great disadvantages then existing, had demonstrated to these pioneers, who were wise enough to receive the truth from any quarter, that the maintenance of separate courts of law and equity was not to be desired, and they declined, therefore, to incorporate this feature of the common law into the system they were framing. In regard to pleading, the same influences operated. Neither the system obtaining in courts of the common law, nor in courts of equity, was entirely adapted to the new conditions. The common law system, with its single issue, and its forms of action, could not be adjusted to the procedure necessary in a court of blended jurisdiction; and the equity system was not in all things suited to jury trials; besides, there were elements of formalism in each, which might well be looked upon as hindrances, rather than aids, in arriving at justice. On the other hand, the pleadings of the civil law were very simple, and admirably adapted to the development of truth.¹⁹

The laws of Coahuila and Texas regarding pleadings, as before quoted, provided for a petition by the plaintiff, a contestation by the defendant.

¹⁸ Id., p. 157.

¹⁹ The Laws of Las Siete Partidas (translated by Lislet & Carleton), Vol. I, law 1, p. 36; law 32, p. 52; law 31, p. 51; law 40, p. 57; laws 7, 8, 9, 10, and 11, pp. 70-74.

a replica by the plaintiff, and a duplica by the defendant. In these pleadings, the parties were respectively allowed and required to set forth, in a plain and intelligible manner, the facts upon which they respectively relied to sustain their positions before the court; in short, to state to the court the real truth of the matter in controversy, so far as they might be able.

First Act of Congress on Pleading—1836.

The responsibility of choosing between these two systems, the common law and the Spanish civil law, devolved primarily on Congress. On December 20, 1836, Congress passed an act organizing the district courts. Its only section referring to pleading is as follows: "It shall be the duty of the plaintiff, or his attorney, in taking out a writ or process, to file his petition, with a full and clear statement of the names of the parties, whether plaintiff or defendant, with the causes of action, and the nature of relief he requests of the court."

This action makes no mention of defensive pleadings; but the courts interpreted it, in the light of the constitutional provision, that old laws should continue until changed by Congress, as a practical adoption of the system theretofore obtaining, and so enforced it. The earliest mention by our Supreme Court of "petition and answer" as a system of pleading, occurs in the third paragraph of the opinion rendered at the January term, 1840, in *Winfred v. Gates*.^{19a} This opinion declared that the Spanish system of pleading was still in force. The exact date of the opinion is not given; but it was the ninth case decided by the Supreme Court of the Republic, at the January term, 1840.

Legislation of 1840 Regarding Common Law and Proceedings.

The Fourth Congress of the Republic, early in its first session, January 20, 1840, passed an act entitled:

"An Act to Adopt the Common Law of England, to Repeal Certain Mexican Laws, and to Regulate Marital Rights of Parties."

Sections 1 and 2 of this act are as follows:

"Section 1. Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That the common law of England, so far as it is not inconsistent with the Constitution or act of Congress now in force, shall, together with such acts, be the rule of decision in this Republic, and shall continue in full force until altered or repealed by Congress.

"Section 2. Be it further enacted, That all laws in force in this Re-

^{19a} Dallam, 364.

public prior to the 1st of September, one thousand eight hundred and thirty-six (except the laws of the Consultation and provisional government now in force; and except such laws as relate exclusively to grants and the colonization of land in the State of Coahuila and Texas, and also, except such laws as relate to reservations of islands and lands, and also of salt lakes, licks and springs, mines, and minerals of every description, made by the General and State Governments) be, and the same are hereby repealed."

The effect of this, unqualified by other legislation, would have been to annul all laws enacted prior to the adoption of the Constitution of the Republic, except those specially retained, and to substitute therefor the common law and the Constitution and then existing statutes of the Republic, and, as Congress had not passed any general practice act, the common law system would have been in force. This was prevented, however, by passing at the same session of Congress an act entitled, "An Act to Regulate Proceedings in Civil Suits." This was approved February 5, 1840.

Section 1 is as follows:

"Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That the adoption of the common law shall not be construed to adopt the common law system of pleading; but the proceedings in all civil suits shall, as heretofore, be conducted by petition and answer; but neither petition nor answer shall be necessary in a cause to recover money before a justice of the peace."

A portion of section 12 is as follows:

"In every civil suit, in which sufficient matter of substance may appear upon the petition, to enable the court to proceed upon the merits of the cause, the suit shall not abate for want of form. The court shall, in the first instance, endeavor to try each cause by the rules and principles of law. Should the cause more properly belong to equity jurisdiction, the court shall, without delay, proceed to try the same according to the principles of equity. * * * *Provided*, nothing herein contained shall be so construed as to prejudice the right of the parties to a trial by jury."²⁰

This is the first reference in Texas to the difference between law and equity; but it must be noticed that there is no separation of the jurisdictions; both law and equity are to be administered by the same court in the same cause, and trial by jury is not to be precluded by the exercise of equity powers by the court.

Congress, at the same season, passed an act that laws passed by it should not go into effect until forty days after adjournment, unless otherwise expressly provided.²¹ This act had such a provision, but there was none in either the act adopting the common law, or the one denying its application to our system of pleading. These two acts, therefore, went into effect at the same time, forty days after adjournment of Congress,

²⁰ Laws of Fourth Congress, p. 88

²¹ *Id.*, p. 6.

and must be construed as parts of the same act. Hence, the common law system of pleading in civil suits did not obtain in Texas at any time under these acts.

Decisions of Supreme Court of Republic Regarding Pleading.

In the case of *Fowler v. Poor*, decided by the Supreme Court of the Republic, January term, 1841,^{21a} this language occurs:

"Our system of proceedings in civil suits differs from that known in England, and adopted in most of the States in the United States. * * * The mode of conducting proceedings in civil suits by petition and answer, is so highly appreciated by the legislative power of this Republic, that at the last session of Congress, it was expressly enacted, that "the adoption of the common law shall not be construed to adopt the common law system of pleading, but the proceedings in all civil suits shall, as heretofore, be conducted by petition and answer." Here is strong legislative declaration that the proceedings in civil suits had been heretofore commenced by petition, and that they shall be conducted in the same manner for the future."

In *Hamilton v. Blank*,^{21b} decided at the June term, 1844, the Supreme Court says: "The object of our statutes on the subject of pleading, is to simplify as much as possible that branch of the proceedings in courts which, by the ingenuity and learning of both common and civil law lawyers and judges, has become so refined in its subtleties as to substitute in many instances the shadow for the substance. Our statute requires at the hands of the petitioner to a court of justice only a statement of the names of the parties plaintiff and defendant, a full and fair exposition of his cause of action, and finally the relief which he asks."

Many other interesting cases could be given from the decisions of the Supreme Court of the Republic to show that the practical interpretation of the statutes under consideration was that the common law system of pleading was never in force in Texas, and that the purpose of the law-makers was to eliminate as far as possible all technicalities and useless forms, and require only a full and fair statement of the facts upon which the party relied, and the relief sought from the court, supplemented by a few indispensable matters, such as names and residences of parties, etc., to enable the court to act intelligently. This is substantially the Texas system of pleading to-day.

There were no material changes made during the Republic in the judicial system thus established. In dealing with this period of our history, we must not lose sight of the important fact that at his time the Supreme Court consisted of a chief justice and the district judges sitting to-

^{21a} Dallam, 403.

^{21b} Dallam, 587.

gether. This plan, impracticable under most circumstances, was of great value then; it was the unifying and harmonizing element in the system. The law of Coahuila and Texas were in a language unknown to most of the judges, and to a large extent inaccessible to the few that could have translated them. The enactments of Congress on methods of procedure were meagre, and the meeting and interchanging of views on these matters by the several district judges, when assembled for the purpose of holding the Supreme Court, must have been salutary in its influence, and have had a strong tendency to introduce the same procedure in all courts.

TEXAS AS A STATE.

During the year 1845 it was definitely determined that the Republic of Texas should surrender its nationality, and take a place as a State in the Federal Union. A State Constitution looking to this end was prepared and adopted; State officers were elected; and on February 16, 1846, the first State Legislature assembled, the State government was organized, President Jones retired and Governor Henderson was inaugurated, the Republic of Texas passed into history, and in her stead the State of Texas became a member of the United States of America.²²

The formative period of her history had passed. Though there have been many modifications made from time to time to adjust herself to the varying conditions of her development, the fundamental ideas of her jurisprudence have since remained unchanged.

JUDICIAL SYSTEM UNDER CONSTITUTION 1845.

In the State government thus established the judiciary article of the Constitution of 1845 became the basis of the Texas judicial system.

The system thus established consisted of a Supreme Court, district courts, county courts, and justices' courts. The jurisdiction of these courts in some instances differed materially from that now exercised by tribunals of same designations.

The jurisdiction of the Supreme Court remained practically as under the Republic. It had appellate jurisdiction only, and was the court of last resort in all cases both civil and criminal.

The most radical change as to it was with reference to the judges composing the court. It was no longer to consist of a chief justice and several district judges sitting in banc, but of a chief justice and two associate justices appointed by the Governor with approval of the senate, who

²² *Cocke v. Calkin & Co.*, 1 Texas, 541; *Calkin v. Cocke*, 14 Howard, 235; *Lee v. King*, 21 Texas, 577.

had no official duties except as members of that tribunal. This change was necessary because of the increase in population and business. The interests of the State required a very considerable increase in the number of district judges and also longer service by them in discharge of their duties in their several districts. The number of cases was also increasing in the Supreme Court so as to necessitate more frequent and longer sessions by it. It was therefore impracticable for the same persons to fill positions in both courts.

The powers and jurisdiction of the district courts is fixed in section 10 of the judiciary article as follows:

"The district court shall have original jurisdiction of all criminal cases, of all suits in behalf of the State to recover penalties, forfeitures, and escheats, and of all cases of divorce, and of all suits, complaints, and pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at, or amount to one hundred dollars, exclusive of interest; and the said courts, or judges thereof, shall have power to issue all writs necessary to enforce their own jurisdiction and to give them a general superintendence and control over inferior jurisdictions. And in the trial of all criminal cases, the jury trying the same shall find and assess the amount of punishment to be inflicted or fine imposed; except in capital cases, and where the punishment or fine imposed shall be specifically imposed by law."

In this section we find the first constitutional reference to any distinction between law and equity. Up to this time this peculiarity of the common law had been continuously ignored, except in section 12, Act of February 5, 1840, heretofore quoted, and in that the recognition was partial and designed to regulate the exercise of both jurisdictions by the same court rather than to adopt and enforce the differences between the two.

This first constitutional reference to this distinction is not to adopt or perpetuate it, but to deny its existence and prevent any attempt at its recognition either by the Legislature or courts of the State. A similar provision has been made in every Constitution of the State since adopted.

As we have seen the common law of England was adopted as the general rule of decision in Texas by Act of January 20, 1840, and continuously from that date the Texans have been an English-speaking people having the common law as the basis of their jurisprudence, but yet denying the arbitrary distinction made by that system between law and equity, and since 1845 have by constitutional provision forbidden the Legislature to incorporate such distinction into its laws. From January 20, 1840, to November, 1846, the date of the adoption by the State of New York of a new Constitution abolishing this distinction it seems to have been the only government of which this was true.

District Court Under Constitution of 1845.

The first Legislature of the State of Texas made speedy and full provision for the organization of the judicial department of the government as contemplated by the Constitution. On May 11, 1846, it adopted an act to organize the district courts and define their powers and jurisdictions.²⁸ Sections 2, 3, 4 and 7 of this act are as follows:

"Sec. 2. Be it further enacted, that the judges of the district courts shall by virtue of their offices, be conservators of the peace, throughout the State, and the district courts shall have original jurisdiction of all criminal cases, of all suits in behalf of the State, to recover penalties, forfeitures and escheats, and of all suits against the State, which are or may be allowed by law, and shall have power to hear and determine all prosecutions in the name of the State, by indictment, information or presentment for treason, murder or other felonies, crimes and misdemeanors, committed within their respective jurisdictions, except such as may be exclusively cognizable before justices of the peace or other courts of the State, and shall, in criminal cases, have and exercise all the powers incident and belonging to courts of oyer and terminer, and general jail delivery; also of all suits for the recovery of land, of all cases of divorce and alimony, and of all suits, complaints and pleas whatever, without regard to any distinction whatever between law and equity, when the matter in controversy shall be valued at or amount to one hundred dollars or more, exclusive of interest, and generally to do and perform all other acts pertaining to courts of general jurisdiction.

"Sec. 3. Be it further enacted, that the district courts shall have and exercise appellate jurisdiction and general control over such inferior tribunals as have been or may be established in each county, for appointing guardians, granting letters testamentary, and of administration for settling the accounts of executors, administrators and guardians, and for the transaction of business appertaining to estates and original jurisdiction in probate matters, only in cases where the judge or clerk of probate is interested."

"Sec. 4. Be it further enacted, that the judges of the district courts, and each of them, either in vacation or term time, shall have authority to grant on petition to them therefor, writs of *habeas corpus*, *mandamus*, injunction, sequestration, error and *supersedeas*, and all other remedial writs, known to the law, returnable according to law: provided, that no *mandamus* shall be granted on an *ex parte* hearing, and any peremptory *mandamus* granted without notice, shall be deemed void: and further provided, that all writs of *mandamus*, sued out against the heads of any of the department or bureaux of government, shall be re-

²⁸ Laws of the First Legislature, 200.

turnable before the district court of the county in which the seat of government may be."

"Sec. 7. Be it further enacted, that the district judges, when the appropriate relief is prayed for, may grant all such orders, writs or other process necessary to obtain such relief, and may also, so frame the judgments of the courts as to afford all the relief which may be required by the nature of the case, and which is granted by courts of law or equity."

Inferior Courts Under This Constitution.

Justices' courts were established and given jurisdiction in civil matters involving one hundred dollars or less, authority to try which was not conferred exclusively on the district court. These courts also had jurisdiction of a few misdemeanors mainly breaches of the peace and minor offenses against the person in which the punishment could not exceed a fine of \$50. The power of the justices of the peace as committing magistrates was quite extensive.²⁴

A probate court, consisting of one judge, was established in each county, upon which was conferred all powers ordinarily exercised by courts of that class.²⁵

Under this Constitution there was no county court with jurisdiction to try cases. A tribunal designated "the county court," composed of one chief justice and four commissioners, was created in each county. Its jurisdiction extended to all matters of county business and finances. It had no power to try causes between individuals.²⁶

Legislative Power Over These Courts.

In the act organizing justices' courts (section 20) the Legislature declared that from final judgments of justices' courts appeal should lie to the district courts; and in an act hereafter referred to, regulating practice in the latter, ample provision was made for the exercise of such appellate jurisdiction by them. Under these statutory enactments for several years appeals were actually taken from the justices' courts to the district courts and the cases were retained and tried there. In 1849, in the case of *Titus v. Latimer*,²⁷ the point was made that as the district court was created by the Constitution and its jurisdiction defined therein, the Legislature had no power to change such jurisdiction, either

²⁴ Laws of the First Legislature, 298 et seq.

²⁵ Laws of the First Legislature, 308 et seq.

²⁶ Laws of the First Legislature, p. 333.

²⁷ 5 Texas, 433.

by adding to or taking from; and, as appellate jurisdiction in cases from the justices' court was not given to the district court by the Constitution, the statutes attempting to confer it were void. The court was divided in its opinion on the question, but the majority, Hemphill, C. J., and Lipscomb, A. J., sustained the point, Wheeler, A. J., dissenting. The opinion of the court was delivered by Judge Lipscomb. After stating the case, he says:

"The importance of the question is sensibly felt and fully and frankly acknowledged; and it is a matter of serious regret that it should be suddenly sprung upon the court without the benefit of having it discussed at the bar. It is now nearly four years since the Legislature at its first session, proceeded to organize justices' courts and define their jurisdiction, and, among other things, gave the right of appeal, as a matter of course, from their decisions to the district courts. The same Legislature, at the same session, passed an act organizing the district courts, and another regulating judicial proceedings in the district courts. In the last, the manner in which appeals from the justices of the peace are to be tried is defined and expressly provided for. In all the intervening time since those acts were passed they have been acted on and judicially recognized as valid without having ever before been questioned. If, however, they are repugnant to the Constitution and could not give jurisdiction, neither the lapse of time nor the practice of the courts can vindicate the exercise of such jurisdiction.

"Justices of the peace and other inferior tribunals are recognized by the Constitution; the extent of their jurisdiction, however, is left wholly to the Legislature. But the district court and the Supreme Court, both as to their institution and jurisdiction, are essentially the creatures of the Constitution. On those courts the Legislature can neither confer nor take away jurisdiction. If the jurisdiction given by the Constitution can not be exercised because the mode has not been expressly provided for in the fundamental law of their creation, it would be competent for the Legislature to regulate the manner in which it should be exercised. But if the mode had been expressed contemporaneously, and by the same authority that created the jurisdiction, it would not be competent for the Legislature to direct a different mode. The Supreme Court is exclusively a court of appellate jurisdiction. The Constitution has conferred on it no original jurisdiction, nor can the Legislature confer any such, because it has been created by the Constitution an appellate tribunal only. The district court is a court of original jurisdiction, and this original jurisdiction is not derived from nor dependent on the Legislature. All that can be done by the Legislature is to regulate the manner in which its jurisdiction shall be exercised. If the Constitution has not given it appellate powers it is not competent for the Legislature to do so. There is a very obvious distinction, to my mind, between controlling an inferior jurisdiction and the exercise of an

appellate power: the former can be exerted to prevent action; the latter requires the act to be done before it can be appealed from. Hence, when the tenth section of the fourth article of the Constitution confers the powers on the district court and the judges thereof to 'issue all writs necessary to enforce their own jurisdiction and to give them a general superintendence and control over inferior jurisdictions,' it does not, from necessity or by reasonable inference, give them appellate jurisdiction. If it was intended to withhold general appellate jurisdiction, and not to give a control over inferior jurisdiction, it would have been difficult to have expressed that object in more appropriate terms than have been used. A control of the acts of those tribunals is expressly given by the issuance of writs very familiar to courts of general original jurisdiction. The writs of *certiorari*, *mandamus*, *quo warranto*, *injunction* and *prohibition*, would afford ready means of exercising control. Had it been intended that, in addition to the use of these writs, a general appellate jurisdiction should be exercised, it is certainly most probable that it would have been so expressed in the tenth section as it is in the fifteenth section, in giving jurisdiction over the probate court.

"Believing that the power to give jurisdiction by the act of the Legislature can not be derived from the Constitution, there is no error in the decision of the court below in dismissing the appeal. Judgment affirmed."

Thus early in the history of our State were adopted and applied rules of strict construction of constitutional grants of power to the several courts created by organic law. These rules were most rigidly and consistently enforced in interpreting all our Constitutions up to the amendments of 1891, and notwithstanding the evident intent to avoid them manifested in those amendments, their influence continues to be felt in some of the courts now existing.

Pleadings Under Practice Act of 1846.

The Legislature at this first session also gave special attention to matters of practice in the courts, and passed an act, approved May 13, 1846, to regulate proceedings in the district courts, which comprised 158 sections, and covered the whole field of procedure in said courts, enumerating and repealing by name every former provision relating to practice in all civil suits, but not repealing the act adopting the common law as to evidence and juries except so far as in conflict with it.²⁸

The requirements of this act as to pleading are as follows:

"Sec. 3. Be it further enacted, that all civil suits in the district court shall be commenced by petition filed in the office of the district court."

²⁸ Laws of the First Legislature, 363.

"Sec. 5. Be it further enacted, that the petition may be filed by the plaintiff or attorney and shall set forth clearly the names of the parties and their residences, if known, with a full and clear statement of the cause of action and such other allegations pertinent to the case as he may deem necessary to sustain the suit, and also a full statement of the nature of the relief requested of the court."

"Sec. 29. Be it further enacted, that the defendant in his answer may plead as many several matters whether of law or fact as he shall think necessary for his defense and which may be pertinent to the case: provided, that he shall file them at the same time and in due order of pleading."

"Sec. 32. Be it further enacted, that all pleas filed shall be taken up and disposed of by the court in due order of pleading under the direction of the court."

Early Decisions of State Supreme Court on Pleading.

That the full force of this law may be appreciated, it is well to consider the construction placed by our Supreme Court upon the prior acts of Congress with reference to procedure, and particularly upon the words "petition and answer" as occurring therein. The case of *Underwood v. Parrott*²⁹ was an action brought in the district court, apparently before the adoption of the Constitution of 1845, though the decision of the Supreme Court was not rendered until the December term 1847. In this case Judge Wheeler speaking for the court says:

"The act of 1840, 'to regulate proceedings in civil suits,' 4 Stat., 88, declares that, 'the adoption of the common law shall not be so construed as to adopt the common law system of pleading but the proceedings in all civil suits shall, as heretofore, be conducted by petition and answer.'"

"This provision was evidently intended not to prescribe the rules, but to designate the system of pleading to be observed in our courts. The attention of the Legislature was directed to the fact that different systems of conducting the allegations of the parties prevailed in different countries and in different jurisdictions in the same country. They had adopted as the body of our municipal law the common law of England, but they were averse to the system of pleading observed in the forums of that country; and recurring to the fact that a different system prevailed here with which the courts and bar were supposed to be familiar, and which was supposed to be more simple and equitable, and better adapted than the English system to attain the true and ostensible object of all systems of pleading—a just decision upon the merits of the matter in controversy—they determined to retain the existing system.

²⁹ 2 Texas, 178.

Hence the antithesis which the last member of the sentence presents to the first; the words 'petition and answer' being used in opposition to 'the common law system of pleading,' not to signify the stages of pleading to which these words give names, but to designate the *system* to which they belong. And, doubtless, to secure one uniform system of conducting the allegations of the parties, as well as to retain for that purpose the then existing system, they declare that the proceedings 'in all civil suits,' whether they would have appertained to the common law or chancery jurisdiction in England, shall as heretofore, be conducted by petition and answer.' These words then were not intended as a restriction or limitation of the pleadings to the answer, but as the designation of a system of pleadings—that being the subject present to the mind of the Legislature, who were not treating of a declaration or plea, or of a petition or answer, but of the remedial systems in which those terms are employed, and which they describe; and they used them not to denote a prescribed formulary, but as indicative of their intention to retain the then existing system in opposition to the common law and chancery systems of pleadings in England. They retained the existing system without alteration, 'to be conducted,' in their own language, 'as heretofore.'

"The inquiry then resolves itself into this: was a replication recognized by the laws anterior to the cited provision? By reference to the laws of the State of Coahuila and Texas, decree 277, section 6, article 101, page 266 of the laws and decrees, it will be found that the former laws upon the subject did permit the parties to employ the *replica* and *duplica*, answering to the replication and rejoinder of the English system; but to these they restricted the pleadings. And although the body of the former laws was repealed at the period of the adoption of the common law, 4 Stat. pp. 3, 4, yet the same Legislature retained the system of pleading in opposition to that of the common law. *Id.*, 88, sec. 1. That it is allowable, therefore, to carry to pleadings beyond the answer, I can not doubt. In a case like the present, to reply the facts intended to be relied on in evidence to repel the defense disclosed by the answer, would seem most consonant to principle and convenient in practice. If the party must apprise the court orally of the facts intended to be relied on before he can insist upon the introduction of his evidence, why not put them in writing upon the record, not only for the information of the court, but to apprise the opposite party of the proofs he must be prepared to meet. This would seem more consistent with fairness and justice than to permit a party to assume mentally the basis of his proofs, and disguise and conceal them for the purpose of surprise and undue advantage. It would prevent confusion and embarrassment, surprise and injustice, in the district courts, and would present the case in a far more intelligible form for revision here. It would disencumber the record of a mass of matter embodied in bills

of exceptions and statements of facts; for it is only by these, in the absence of pleadings, that the matters arising subsequent to the answer can be presented here for revision."

At the same session of the Supreme Court, the case of Coles v. Kelsey was decided, Justice Lipscomb rendering the opinion.³⁰ In it he uses this language:

"I do not believe, however, that on this subject we can with safety rely on common law rules of pleading, as our system of bringing suits by petition bears no analogy to the common law practice. But there is a most striking similarity in our forms to the English bill and answer in chancery, so much so as to leave no doubt of their kindred origin. They are both derived from the Roman law, out of which grew up the civil law, which now prevails all over continental Europe with various modifications; ours came to us through the laws of Spain. Judge Story says that equity pleadings were borrowed from the civil law, or from the canon law, which is a derivative from the civil law, or from both. Hence, at almost every step, we may now trace coincidences in the pleading and practice in a Roman suit. Story's Equity Pl., sec 14. The same author, section 23, says 'an original bill praying for relief is, as we have seen, founded upon some right claimed for wrong done by the defendant, in order to enable the court to understand the case, and to administer the proper remedial justice, as well as to apprise the opposite party of the nature of the claim and of the redress asked, and to enable him to make the proper defense thereto, it would seem indispensable that the bill should contain a clear and exact statement of all the material facts.'

"This is a pretty accurate description of what a petition ought to embrace in our courts; in truth, to set aside a few set phrases, which are mere matter of form, there is no difference in their structure. There is, however, another reason that should recommend the chancery practice to our courts as rules of pleading in preference to that of the common law courts. It will be seen that the Legislature has expressly directed that suits should be brought by petition, i. e., the act to regulate judicial proceedings in civil suits, section 1: 'That the adoption of the common law shall not be construed to adopt the common law system of pleading, but the proceedings in all civil suits shall, as heretofore, be conducted by petition and answer.' See Acts Congress 1840, p. 88. Thus in express terms it continues the former practice that had grown up under the civil law. And the fourth article, judicial department, section 10, of the Constitution of the State, in granting jurisdiction to the district courts, directs that 'it is to be exercised without regard to any distinction between law and equity;' this mixed jurisdiction must doubtless still more assimilate our proceedings to the pleadings in chan-

³⁰ 2 Texas, 542.

cery, as every cause of action must be asserted by the resort to the petition, to be modified to suit each particular case. I do not mean to be understood as maintaining that we have the chancery rules of pleading as a body; I only mean that they will be found more analogous to our system, and more to be relied on, than those of the common law."

These cases show clearly that by "petition and answer" in the early laws of Texas is not meant the written instruments so familiar to the Texas practitioner under those names, but a system of pleading unique in its character, and without any exactly corresponding counterpart.

In the course of the many changes in our law—organic and statutory—this blended jurisdiction of law and equity in the same court and this system of pleading by petition and answer have remained unaltered.

The difference between this Texas method of procedure and the common law is too plain to need pointing out. The difference between this and the ordinary code system is also apparent. The Texas plan allows to both parties and to the court the greatest latitude which is consistent with safety, and yet encourages the parties to make known to the court the very facts upon which they respectively rely, and puts a premium upon clear, concise, and logical statement of these facts. It does not require the attorney for either party to determine in advance at the peril of his client whether his cause of action be technically legal or equitable, or in what form of action he shall proceed, or to select one issue upon which to risk the whole case; but permits him to present to the court every phase of the controversy and to ascertain whether or not, from any point of view, consistent with truth, his client is entitled to relief.

No Material Changes Till 1869.

The Constitution of 1845 was amended in 1850 so as to make the judicial officers elective; with this exception it remained unaltered until the convention of 1861, when it was modified so as to conform to the changed conditions arising from secession. As thus modified it constituted the State Constitution during the existence of the Confederate government.

In 1866 another convention met in Austin and proposed certain amendments to the Constitution, making it conform this time to the change growing out of the defeat of the Confederacy.

These amendments were voted on by the people on the fourth Monday in June, 1866, and were adopted, and the officers therein contemplated were elected and entered upon the discharge of their duties. The Congress of the United States, however, refused to admit Texas into the Union under this Constitution, and the government formed under it was dissolved and a reconstruction government instituted and maintained under acts of Congress.

CONSTITUTION OF 1869.

JUDICIAL SYSTEM UNDER CONSTITUTION OF 1869.

By this reconstruction government, a convention was called to frame another Constitution to be submitted to the people and then to the Federal Congress. This convention met in Austin on June 1, 1868, and adjourned February 6, 1869. The Constitution passed by it in its "Election Declaration" provided for its submission to the people on the first Monday in July, 1869, but the powers at Washington did not concur in this date. The President by proclamation of date July 15, 1869, ordered its submission on Tuesday, November 30, 1869. The time was again changed by military commander, and the election in fact took place on November 30, and December 1, 2, and 3, 1869.³¹ The Constitution was adopted, and at the same time the State officers and others contemplated therein were elected. The Legislature met February 25, 1870, and adopted the thirteenth, fourteenth, and fifteenth amendments to the Constitution of the United States. By act of Congress approved and taking effect March 30, 1870, Texas was restored to full fellowship in the United States.

The judicial article in this Constitution is as follows:

"Section 1. The judicial power of the State shall be vested in one Supreme Court, in district courts, and in such inferior courts and magistrates as may be created by this Constitution, or by the Legislature under its authority. The Legislature may establish criminal courts in the principal cities within the State, with such criminal jurisdiction, coextensive with the limits of the county wherein such city may be situated, and under such regulations as may be prescribed by law; and the judge thereof may preside over the courts of one or more cities as the Legislature may direct."

The Supreme Court consisted of three judges and had appellate jurisdiction only. In civil cases, this was coextensive with the limits of the State. In criminal cases no appeal was allowed to the court, unless one of the judges, upon inspection of the record, believed that some *error of law* had been committed in the trial. The district courts had all the jurisdiction now exercised by both district and county courts. The judges of the Supreme and district courts were appointed by the Governor.

³¹ 2 Pasch. Laws, note 1227.

JUDICIAL SYSTEM UNDER CONSTITUTION OF 1876.

This Constitution and its amendments were in turn superseded by that under which the government is now being administered, known as the Constitution of 1876. This was formulated by a convention which sat in 1875 and was submitted to the people and adopted on February 15, 1876, and by its own terms became operative on April 18, thereafter.

The judicial system created by this instrument (in its original form) comprised two courts of last resort, namely, the Supreme Court and the Court of Appeals. The first consisted of three judges and had appellate jurisdiction of all civil cases tried in the district courts, but no jurisdiction in criminal cases or in appeals from the county court. The second consisted of three judges, and had appellate jurisdiction in all appeals in all criminal cases from the district, and of all appeals from the county court, in both civil and criminal matters. There were four classes of courts of original jurisdiction, namely, district, county, county commissioners, and justices. The jurisdiction of all these was, in many respects, the same as the courts of the same designations under the present law.

This Constitution made all judicial officers elective.

With the development of the State and the growth of its population and business, the volume of litigation increased so much that it was found impossible for the Supreme Court to dispose of the cases brought before it. It was apparent that relief in some form must be provided for the unreasonable delay of justice, which in many cases amounted to a denial of all practical relief. Resort was had to a commission of appeals, consisting of three lawyers appointed by the Governor, who were to sit as a commission, and to whom were to be referred causes pending before the Supreme Court, and civil cases pending in the court of appeals, in which the parties should agree to such transfer. The decision of these cases by the commission was to be final without examination or approval by the Supreme Court. The act creating this tribunal was approved July 9, 1879.³²

Serious questions were raised as to the constitutionality of this act, but the majority of the Supreme Court construed it as creating a board of arbitrators and not a court, and sustained the law.³³ By its own terms this act was to expire in two years. The next session of the Legislature offered an amendment to the judiciary article of the Constitution, which among other changes, proposed to increase members of the Supreme Court to seven judges. The adoption of this amendment

³² Acts of the Special Session, Sixteenth Legislature, p. 30.

³³ Henderson v. Beaton, 52 Texas, 29.

being doubtful, the Legislature by the act of July 9, 1881, provided for a continuance of the commission, making, however, material changes in the law. The reference of cases was no longer confined to those agreed on by the parties, but the Supreme Court and the Court of Appeals were authorized to refer cases to it, without such consent; the power to finally determine cases was taken away and the decisions of the commissioners were required to be submitted to the Supreme Court, and were not to be valid unless approved by it; so when adopted the opinions were to be published officially, and the judgments were to be rendered by the Supreme Court in conformity with the decisions. This act was also attacked as unconstitutional, but was again sustained; this time on the theory that, while the voluntary feature of the former law, upon which it had been sustained, was eliminated, yet the denial of the right of final determination of questions by the commission, and requiring all decisions to be approved by the Supreme Court, made the law valid.³⁴ The proposed amendment to the Constitution was voted on in September, 1881, and defeated. The commission of appeals was continued from time to time until by act of April 8, 1891, two sections of three judges each were created. It soon became apparent that it required a very large share of the time and attention of the Supreme Court to examine and pass upon the work of the two commissions, and that the continuance of that policy by increasing the number of commissions would soon result in practically depriving the Supreme Court of any opportunity to consider and decide cases upon its own investigation. Some change seemed imperative.

SYSTEM UNDER AMENDMENT OF 1891.

The Legislature submitted amendments to the judiciary article of the Constitution, which were voted on and adopted in September, 1891. These are the present constitutional provisions on this subject.

The system created thereby consists of one Supreme Court, having civil jurisdiction only, and whose duty it is to revise decisions of the courts of civil appeals in enumerated classes of cases, and to hear a few classes of original suits against the heads of departments and State officers; a Court of Criminal Appeals, having appellate jurisdiction of all criminal cases tried in the district and county courts, but having no civil jurisdiction whatever; courts of civil appeals, having appellate jurisdiction of all civil cases tried in the district and county courts, and whose decisions in many classes of cases are final, and in others are subject to review and correction by the Supreme Court; district courts, having jurisdiction over the larger share of civil litigation

³⁴ Stone v. Brown, 54 Texas, 330.

of importance, and of criminal cases of the grade of felony, and of all suits and complaints, jurisdiction over which is not expressly conferred on some other tribunal; county courts, having jurisdiction of civil matters of less importance than those committed to the district court, and of all matters of probate, and of misdemeanor cases; justices' courts, having jurisdiction over all civil litigation involving less than two hundred dollars and not committed to some other court, and criminal jurisdiction of misdemeanors where the penalty does not exceed a fine of two hundred dollars; and a county commissioners' court, having jurisdiction over all county business matters.

The changes made by these amendments are great. The most material were to deprive the Supreme Court of immediate jurisdiction in cases appealed from courts of original jurisdiction, and confine it to the hearing of designated kinds of cases coming from the courts of civil appeals, and to give to it original jurisdiction in certain kinds of cases against heads of departments of the State government, when the Legislature should so provide; to create a court of last resort in criminal cases without any civil jurisdiction; to create courts of civil appeals, to which all appeals from district and county courts in civil cases lie; and to give to the district court original jurisdiction of all suits that are not within the expressed jurisdiction of some other court.

Rigidity of Former Systems.

The difference between the present Constitution and former ones as regards the elasticity of the judicial systems created by them respectively is very great. Beginning as early as 1849, in the case of *Titus v. Latimer*,³⁵ the Supreme Court adopted very strict rules of construction as to the powers and jurisdiction of courts created by the Constitution. The doctrine of the case, as aptly stated in the syllabus, is as follows: "The Supreme Court and the district court are essentially creatures of the Constitution. The Legislature can not add to nor take from their jurisdiction. Where the Constitution has not prescribed any mode in which the jurisdiction shall be exercised, it is competent for the Legislature to do so. But where the Constitution prescribes a mode, the Legislature can not prescribe a different."

This rule was recognized and enforced with all of its logical consequences by an unbroken line of decisions until the adoption of the amendments in 1891; and indeed its spirit, if not its letter, seems still to dominate the Court of Criminal Appeals. Among the most interesting

³⁵ 5 Texas, 436.

³⁶ 48 Texas, 413.

of these cases are *Ex Parte Towles*,³⁶ *Williamson v. Lane*,³⁷ both under the Constitution of 1869, and *Gibson v. Templeton*,³⁸ under the Constitution of 1876. In the latter this language is used: "The opinions of this court rendered previous to that in *Ex Parte Whitlow*, established clearly the following principles: 1. The district court has under our Constitution no jurisdiction of any civil proceeding which is not a suit, complaint, or plea, wherein the matter in controversy is valued at or amounts to \$500, exclusive of interest. *Ex Parte Towles*, 48 Texas, 413; *Williamson v. Lane*, 52 Texas, 344. Except it be a proceeding coming under its general power to issue an injunction (58 Texas, 616), mandamus, certiorari, and writs necessary to enforce its jurisdiction.

"2. The Legislature has no power to confer upon the district courts a jurisdiction not given by the Constitution. Hence it can not authorize it to take cognizance of any proceeding not a suit, complaint, or plea of the character above described. Same authorities.

"3. That a proceeding to contest an election is not a suit, complaint or plea within the meaning of the Constitution. That there is a difference between the contest of an election and a suit for an office, the latter being a suit within the letter and meaning of the Constitution, the former involving a political, or rather an extrajudicial, question to be regulated under the Constitution by the political authority of the State. Same authorities; also *Wright v. Fawcett*, 42 Texas, 203; *Rogers v. Johns*, Id., 339.

"The logical deduction from these well settled principles is that under the Constitution of 1876 the district court can not entertain jurisdiction of a proceeding the object of which is merely to contest an election and which is not a suit between claimants for the recovery of the office itself."

Elasticity of Present System.

It is apparent that a system of so little elasticity could not be adapted to the varying conditions of a progressive people, and that so long as our courts were all tribunals of enumerated powers and must each be able to point out specific warrant in the Constitution for all it did, there must of necessity arise unforeseen contingencies for which no provision had been made; and that no matter how apparent the hardship of the situation, neither the Legislature nor the courts could give relief. These defects, coupled with the fact that it was a physical impossibility for the Supreme Court to keep up with the vast and ever increasing number of appeals in civil cases, constituted the recognized necessity for a change in our judicial system. The amendments of 1891 were the result. The con-

³⁷ 52 Texas, 336.

³⁸ 62 Texas, 556.

gestion of the Supreme Court docket was relieved by the creation of intermediate courts of appeal in civil cases; and the need of a court having jurisdiction of all grievances not otherwise provided for was filled by conferring such power on the district courts. There were also dispersed throughout the judiciary article many expressions and clauses of such nature as to indicate clearly the elasticity of the system thereby created and the power of the Legislature to modify the jurisdiction of the several courts constituting parts thereof and to adapt them to each other, so long as such changes are not so extreme as to affect the character and integrity of the system as a whole. While it might not be competent for the Legislature to abolish any constitutional court, either by direct provision or indirectly by depriving it of jurisdiction over all or nearly all the subject matter given it by the Constitution, still it seems to be clear that it can regulate and modify such jurisdiction, either by adding to or taking from it or by directing the mode of its exercise, so long as the court so regulated is left with sufficient power to form a substantive part of the judicial system and to discharge the functions committed to it by the Constitution.

One fact must, however, be observed in connection with these general statements, viz., that there is no express power granted to the Legislature to take from the jurisdiction of the district court. It is a court of general jurisdiction in the broadest sense of that term; and, while under section 22, article 25, it is doubtless competent for the Legislature to confer on the county court some kinds of jurisdiction given to the district court, and at the same time to take such jurisdiction from the district court, it is still extremely doubtful whether such a transfer could be made of any of the powers which are expressly conferred by the Constitution upon the district court and denied to the county court. It is clear that the Legislature could not take from the district court any of its constitutional jurisdiction unless at the same time such jurisdiction were conferred upon some other court. It is not to be understood that the opinions announced above are supported by any direct or authoritative adjudication determining the legislative power over the courts under the amendments of 1891; for no such far-reaching decisions have been made. But there have been several cases decided by the Supreme Court which tend strongly in that direction.³⁹

Some of the clauses in the Constitution indicating this change of policy are as follows: The appellate jurisdiction of the Supreme Court extends "to questions of law arising in cases in which the Court of Civil Appeals has appellate jurisdiction, under such restrictions and regulations as the Legislature may prescribe." Until otherwise provided by law, "the jurisdiction of the Supreme Court shall extend," etc. "The Legislature may confer original jurisdiction on the Supreme Court to issue

³⁹ Harris County v. Stewart, 41 S. W., 650; May v. Finley, 43 S. W., 257.

writs," etc. "Courts of civil appeals shall have appellate jurisdiction coextensive with the limits of their respective districts, under such restrictions and regulations as may be prescribed by law." The clause providing for district courts concludes as follows: The district court "shall have general original jurisdiction over all causes whatever for which a remedy or a jurisdiction is not provided by law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law." Regarding county courts the provision is: "The Legislature shall have power by local or general law to increase, diminish, or change the civil and criminal jurisdiction of county courts, and in case of any such change of jurisdiction the Legislature shall also conform the jurisdiction of the other courts to such change." The justice court has a certain designated jurisdiction, "and such other jurisdiction, criminal and civil, as may be provided by law, under such regulations as may be prescribed by law." The Constitution is evidently designed to establish a well defined system of courts, whose relative positions and functions are plainly indicated, but in matters of detail large discretion is purposely left to the Legislature. The spirit of this amendment is so different from the rules of interpretation applied by the courts to former Constitutions, that the decisions announcing those rules can be of but little value as authority in determining questions arising under the amendments. It is true the Court of Criminal Appeals, in *Leach v. State*,⁴⁰ cite and rely upon these former decisions; but these cases can not be regarded as authoritative in civil suits, and, moreover, as shown by the authorities cited above, the Supreme Court of the State has in several cases come to directly the opposite conclusion and has gone far toward announcing the rule of liberal construction.

⁴⁰ 36 Texas Crim. Rep., 248.

CHAPTER V.

ORGANIZATION OF DISTRICT AND COUNTY COURTS.

The district and county courts consist of a judge, jurors, clerk, and sheriff. Attorneys at law are officers of the court, but are not essential parts of it.

THE JUDGE.

The judge is the head of the court, its principal and most responsible member. So important and conspicuous are his functions that he is often spoken of as the court. He is the mouthpiece of the sovereign, its most responsible and authoritative representative, under whose direction and control all other members and officers of the court are placed. He presides at its sittings, has general control over its proceedings, decides all questions of propriety of conduct on the part of all persons connected therewith, supervises the official action of every one engaged in carrying on any part of its work, decides all questions of law that arise in the administration of justice, and also all questions of fact arising incidentally in interlocutory matters, which do not determine finally the case or the cause of action, and also, in the absence of affirmative action calling for a jury, all questions of fact arising in the progress of the trial and its final disposition.

One district judge is elected in each judicial district, who holds his office for four years. If the office becomes vacant at any time, the Governor fills the vacancy by appointment, which must be approved by the Senate, if in session at the time. If the Senate is not then in session, the appointment must be sent to it within ten days after it shall next convene in regular session, and unless the appointee is confirmed before adjournment, the office becomes vacant. In case of confirmation, or if there is no intervening session of the Senate, the appointee holds until the next regular election, at which time the place shall be filled by election. The party so elected shall hold his office only for the unexpired term of the judge who first vacated the office.

To be eligible as a district judge a person must be at least twenty-five years old, a citizen of the United States, who has resided in the district for two years next before his election. He must have been a practicing attorney or judge of a court in this State at least four years.¹

County judges are elected every two years at the regular elections by

¹ Constitution, art. V, sec. 7; Rev. Stats. 1895, arts. 1064-1067.

the qualified voters of the respective counties. They hold their offices for two years. Vacancies occurring are filled by appointment by the commissioners' court of the county.

To be eligible as a county judge, the candidate must "be well informed in the law of the State."²

This question is settled by a majority of the votes cast, and the extent of the judge's legal information can not be inquired into through the courts after his induction into office.³

In addition to his duties and powers as presiding officer of the court, the judge, either in term time or vacation, may grant writs of *mandamus*, *injunction*, *sequestration*, *attachment*, *garnishment*, *certiorari*, and all other writs necessary to the enforcement of the jurisdiction of his court.⁴

The writs so issued by the judge are only in aid of or in carrying out the jurisdiction of the court over which he may preside, or in case of district judges, some other court of the same class. They have no power to finally hear and adjudge cases in which these writs are issued. That can be done only by the court in term time.

District judges are also conservators of the peace throughout the State.⁵

No judge shall sit in any cause wherein he may be interested or where he shall have been of counsel, or where either of the parties may be connected with him by affinity or consanguinity within the third degree.⁶

The public is interested in the impartial administration of justice and the freedom of the judiciary from all appearance of evil or adverse criticism, and hence the parties to a suit can not, by agreement, waive the disqualification of a judge and clothe him with authority to hear a case.⁷

The disqualifying interest must be a pecuniary one, directly involved in the case, or so closely connected with it that the decision rendered will have some legal effect on his property rights.⁸

In the absence of such interest he is not disqualified.⁹

It is the fact of the employment of the judge as counsel and the estab-

² Constitution, art. V, sec. 15, and art. XVI, sec. 17; Rev. Stats. 1895, art. 1124.

³ Little v. State, 75 Texas, 621, 12 S. W., 965.

⁴ Rev. Stats. 1895, arts. 1107, 1163.

⁵ Constitution, art. V, sec. 12.

⁶ Constitution, art. V, sec. 11; Rev. Stats. 1895, arts. 1069-1129.

⁷ Abrams v. State, 31 Texas Crim. Rep., 449; Wynns v. Underwood, 1 Texas, 48; Chambers v. Hodges, 23 Texas, 105; Andrews v. Bank, 23 Texas, 455; Dallas v. Peacock, 33 S. W., 220.

⁸ King v. Sapp, 66 Texas, 519, 2 S. W., 573; Wetzel v. State, 5 Texas Civ. App., 17, 23 S. W., 825; Casey v. Kinsey, 5 Texas Civ. App., 3, 23 S. W., 818; State v. Cisco, 33 S. W., 244; Williams v. Bank, 27 S. W., 147.

⁹ Waters Pierce Oil Co. v. Cook, 6 Texas Civ. App., 573, 26 S. W., 96; Nicholson v. Showalter, 83 Texas, 99, 18 S. W., 326; McFadden v. Preston, 54 Texas, 406; Grigsby v. May, 84 Texas, 240, 19 S. W., 343.

lishment of the fiduciary relation of attorney and client which disqualifies, and whenever that relation has existed as to the subject matter of the suit, he can not sit though no fee was paid or expected, or though the relation may have terminated before his election.¹⁰

Pecuniary interest of a person related to the judge within the prohibited degree does not disqualify unless the relative is a party.¹¹

There are certain statutory bonds taken in the name of the county judge, but in which he has no real interest. Suits on such bonds may be brought before him, in his name officially, and he is not disqualified.¹²

If, at the time set for holding the court, the judge does not appear, or shall, during the term, discontinue the discharge of his duties and abandon the holding of the court before it is adjourned for the term, the attorneys practicing before the court and then present, may, by taking the proper steps under the statute, elect one of their number possessing the proper qualification to hold the court. The judge so elected shall, upon taking the oath of office and entering upon his duties, have the same power and jurisdiction as to holding that term of the court that the regular judge has.¹³

If the regular judge holding a court shall be disqualified for the trial of any particular case on the docket, he shall at once notify the Governor of the fact of such disqualification and the Governor shall at once order an exchange of districts between such judge and some other conveniently situated, and it is the duty of the judges to make the exchange. If, however, a regular judge can not be provided in this way, the parties may agree upon an attorney to try the case.¹⁴

The act making these provisions repeals articles 1069 and 1070 of Revised Statutes of 1895, which had authorized the parties to agree upon judges in cases in which the special judge elected for the term was disqualified. There is no reference to such cases in the last act and it seems, therefore, no authority exists for the procurement of a judge in the district court to try a case in which a judge elected for the term is disqualified.

The Act of 1897 has no reference to the county court, and so the parties to a suit there may agree upon a special judge in any case in which the judge holding the court, whether regular or elected for the term, is

¹⁰ *Wilkes v. State*, 27 Texas Crim. App., 381; *Newcome v. Light*, 58 Texas, 141; *State v. Burks*, 82 Texas, 584, 18 S. W., 662; *Utzman v. State*, 32 Texas Crim. Rep., 426; *Hobbs v. Campbell*, 79 Texas, 360, 15 S. W., 282; *Kemp v. Bank*, 4 Texas Civ. App., 648, 23 S. W., 916; *Railway v. Mackney*, 83 Texas, 410, 18 S. W., 949; *Cullen v. Drane*, 82 Texas, 484, 18 S. W., 590.

¹¹ *Uniston v. Masterson*, 87 Texas, 200, 27 S. W., 768; *Knopp v. Campbell*, 36 S. W., 765.

¹² *Peters v. Duke*, 1 W. & W. C. C., sec. 304.

¹³ Constitution, art. V, sec. 7; Rev. Stats. 1895, art. 1071, through 1077-1132b-1132c.

¹⁴ Acts of 1897 (Special Session), chap. 12, p. 39.

disqualified, and the judge so elected has all the power and authority in that case which the disqualified judge would have had.¹⁵

In case of disqualification of the regular judge of the county court, if the parties fail to agree on a special judge at the first term of the court, the judge should notify the Governor of his disqualification, and he should appoint a proper party to try the case.¹⁶

Whenever a special judge is elected for a term, or part thereof, or is appointed by the governor, or agreed upon by the parties, every fact authorizing such action and every step taken to select such judge and his qualification as such must be entered of record in the minutes of the court.¹⁷

THE JURY.

A jury, under our law, is a body of men obtained from the properly qualified citizens of the State residing in the county in which the court is held, selected and organized according to the requirements of the law, for the purpose of hearing and determining issues of fact arising in the administration of justice.

Juries are grand and petit.

The grand jury is an inquisitorial body organized in the several district courts for the purpose of searching out and investigating violations of the criminal laws and presenting, in due form of law, for prosecution before the courts, all persons who are guilty of such violations. They have no civil functions, and are never impaneled in or by the county courts.

A petit jury in the district or county court is a body of men selected in accordance with the law to hear and determine the issues of fact joined in the pleadings of the parties, in a particular case, whether civil or criminal. In the district court it consists of twelve men and in the county court six.

In cases in which a jury is lawfully demanded, all questions of fact which involve the final disposition of the case, whether arising on pleas in abatement or in bar, must be submitted to it for determination by the judge. In submitting these facts, the judge must advise the jury carefully and fully as to the principles and rules of law by which they are to be guided in reaching their conclusions, but he must not indicate to them directly or otherwise his opinion of the facts except in a few instances in which the law presumes or determines the existence of one fact from the proof of others, or in which there is an express requirement of law making it his duty to do so in the particular case.

¹⁵ Rev. Stats. 1895, arts. 1131, 1132.

¹⁶ Rev. Stats. 1895, arts. 1131, 1132.

¹⁷ As to District Judges, see Rev. Stats. 1895, art. 1075, and Acts 1897, chap. 12; County Judges—Rev. Stats. 1895, arts. 1132a and 1132c.

The use of juries and the qualifications of jurors and methods of selecting them have differed materially at different times in our judicial history. Under the early Spanish judicial system no such institution was known. It is true two men chosen from the body of the county known as "good men" were selected to sit in each case with the judge, but these have very remote connection with or relation to "a jury" as we use the term. Later, the common law as to juries, with all its ideas and incidents, was adopted, and under it and the Constitutions of the Republic and the State up to that adopted in 1875, trial by jury was declared to be a right which should remain inviolate, and unless both the parties affirmatively waived a jury, one was impaneled in every case.

This is still the rule on the common law side of the Federal courts.

In the Constitution adopted in 1875, and legislation under it, the right to jury trial is recognized and guaranteed, but there are limitations placed around its enjoyment in civil cases; that is, no jury is impaneled in any civil case unless one of the parties shall demand it, at the time and in the manner required by law, and shall pay a fee fixed by law as a partial reimbursement of the expense incident to the jury trial. He is relieved from this payment if he file an affidavit of financial inability to obtain the money. Unless such a demand is made, the judge tries the matter both of fact and law arising in the case.

The Constitution of 1875 also required that the Legislature should prescribe the qualifications of jurors. The change of policy indicated in these constitutional provisions has been carried out by the Legislature, and our present jury system has very practical recognition of the power of the Legislature to regulate the right of parties to jury trials and the qualifications of persons who are permitted to render jury service. It is not designed to go into a detailed consideration of all these statutes and the cases construing them, but a general treatment of the subject is indispensable.

Qualifications of Jurors.

To be qualified to serve as a juror a person must—

First.—Be a male over twenty-one years of age.

Second.—A citizen of this State, residing in the county in which the service is to be rendered, qualified to vote therein.

Third.—Be a freeholder in the State or a householder in the county. A freeholder is one who holds title to real estate, within the State, and a householder is one who has lawful possession and control of a house.

"A house is any structure inclosed with walls and covered," and any one who has a legal right in such a structure and who exercises thereunder the present right of control over it is a householder.

Fourth.—Be of sound mind.

Fifth.—Be of good moral character.

Sixth.—Not have been convicted of theft or any felony.

Seventh.—Not be under legal accusation of theft or any felony.

Eighth.—Be able to read and write; and

Ninth.—Not have served as a juror for six days in preceding six months in the district, or three months in the county court. Neither of these last two disqualifications can be insisted on in counties which, in the opinion of the judge, are so sparsely settled as to render it difficult to obtain the necessary jurors if they were enforced.¹⁸

There are a number of matters which are legal exemptions from jury service if claimed by the juror. They are not disqualifications, and can not be made cause for challenge.¹⁹

Panels for the Week and Manner of Forming Them.

In order to obtain the best jurors possible, the law requires the judges of the district and county courts at each session to select three men to act as jury commissioners. They must be intelligent persons, qualified to serve as jurors, freeholders of the county, residing in different portions of the county, and must not be interested in any litigation pending in the court which requires the intervention of a jury. Great care should be exercised in this selection, as the duties of the commissioners are very important. It is the duty of these commissioners to select the persons who are to serve as jurors at the succeeding term of the court. They are, in open court, sworn by the judge and instructed as to their duties. The judge informs them for what weeks of the court jurors will be needed and how many to select for each week. The statute is very specific as to the manner of selecting. The names of all those chosen for each week are written by the commissioners on duplicate lists, each entitled a list of the jurors for that week, designating it. These lists are certified to by the commissioners and are then sealed up by them and delivered to the judge in open court, and he in turn delivers one set of them to the clerk. The commissioners are required to destroy all evidence of their action except the lists delivered to the court, and not to divulge the name of any person chosen as a juror.

The clerk is sworn not to open the lists except in conformity to law.

One set of these lists is kept by the clerk of the court until not more than thirty nor less than ten days before the next term of his court, and then opened and copies given to the sheriff for purpose of summoning the jury. The other lists, are given by the judge to the clerk of the other court in his county,—that is, by the district judge to the county

¹⁸ Rev. Stats. 1895, arts. 3138, 3139, 3140.

¹⁹ Rev. Stats. 1895, arts. 3142, 3143, 3144.

clerk and by the county judge to the district clerk,—to be by him safely kept and delivered to the commissioners next appointed in his court.

It is the duty of the sheriff to diligently search for and summon the jurors selected by the commissioners and whose names are on the lists furnished him, and it is the duty of these persons so summoned to attend the court and serve as jurors unless they have proper excuse, and they are subject to fine for failing to do so.

When the day for impaneling the jury for each week arrives, the sheriff, in open court, calls the names of all persons who have been summoned by him from the lists made by the commissioners for that week, and these parties come forward and are examined under oath as to their qualifications. Those found not to be qualified are excused from service; opportunity is then presented for those qualified to present to the judge reasons they may have for not serving. These are passed on by the judge and all not excused are accepted as jurors for that week, and if they are sufficient in number to do the work they are sworn as jurors and constitute the "panel" for that week. If there are not enough of them, the sheriff and his deputies are sworn and sent out by the court to summons other qualified persons to complete the panel. The oath administered to the sheriff is very comprehensive, and if properly observed would relieve much of the abuse that still remains in the system.

The persons brought in by the sheriff are sworn and tested by the court and their excuses heard as in the first instance, and this process is kept up until there is secured a sufficient number, and these persons—that is, those originally selected by the commissioners and who are accepted and those brought in by the sheriff and found qualified and not excused—constitute the panel for the week. This panel is the primary source from which to obtain the juries to try all cases coming up during the week for which it is formed. The panel formed for one week may, in the discretion of the court, be adjourned to another week of the same term.²⁰

If there should, from any cause, be no jurors selected for the term or any week during the term designated for jury trials, the court must take the necessary steps to supply the deficiency. If the omission applies to the whole term, the better way is to appoint commissioners and have jurors regularly selected, and in one case it was held this was the only method.²¹ But the courts have declined to follow this decision, and the later cases hold that the use of commissioners is preferable, when practicable, but that the court may have jurors summoned through the sheriff and constitute the panel for the week in that way.²²

²⁰ *Howard Oil Co. v. Davis*, 76 Texas, 630, 13 S. W., 665.

²¹ *Daniel v. Bridges*, 73 Texas, 153, 11 S. W., 121.

²² *Smith v. Bates*, 28 S. W., 64; *H. E. & W. T. Ry. Co. v. Vinson*, 38 S. W., 540; *W. U. Tel. Co. v. Everheart*, 10 Texas Civ. App., 472, 32 S. W., 90.

THE CLERK.

In each county in the State having eight thousand or over inhabitants, the offices of district clerk and county clerk are separate, and at each general election the qualified voters elect a person to each of these positions. In counties having less than eight thousand inhabitants the offices are filled by the same party, though he is required to qualify and give separate bond in each capacity. In each court the clerk is the keeper of the records; he prepares all dockets and keeps the minutes of the court. He also receives and files, and is the custodian of all file papers in all cases pending or tried in his court. He is the keeper of the records and seal of the court, and he alone can give certified copies of the records in his office including all file papers and the minutes of every kind. He makes and certifies to all transcripts in appeals and writs of error. He issues all process of every kind emanating from the court, makes out the lists of the jurors, and swears the witnesses.

THE SHERIFF.

In each county there is a sheriff elected every two years, among whose duties it is to execute all process properly directed to him from the courts of his county or elsewhere throughout the State, and to carry out the verbal orders of the court, as in summoning jurors, etc. He is the custodian of all persons in the hands of the court either on criminal charges, for contempt, or while under the rule as witnesses, or while serving on a jury, or for any other reason. He must keep order in and about the court, and, in short, is the hand of the court, with which it puts into actual effect the orders and judgments on which the judge as head may determine.

ATTORNEYS AT LAW.

Attorneys at law are officers of the courts in which they practice, subject, in a large measure, to the control of the judge. Their functions are very important, and upon them and their probity of conduct depends in a large measure the practical success of the government's effort to administer justice. Their proper relation to the court is that of assistants in its efforts to discover the truth both as to the law and facts of cases being heard. Upon them devolves almost exclusively the preparation of cases for hearing and the actual conduct of the investigation. They should always be honest, candid, prompt, and energetic in the discharge of their duties.

TERMS OF COURT.

It is essential to the performance of the duties of a court that there should be a judge, a clerk, and a sheriff in attendance, and, in those cases in which parties are entitled to a jury and one has been demanded, jurors also. The law fixes the times and places of the meeting together of these officers and the organization of the court for holding sessions for the hearing of causes. In the case of the district court the Constitution fixes the place of holding at the county seat of the county.

This is mandatory and can not be changed by the Legislature.

The Constitution also provides that there shall be at least two terms of the district court in each organized county each year. There may be more.

The Legislature can require the holding of other regular terms if it sees fit, and if the work of the court can not be done in the regular terms provided for by the Legislature, the district judge may, by written order made during regular term time and entered on the minutes, provide for the holding of a special term for trying cases then pending in the court and named in the order. No new cases can be brought to such special term, nor can any case not specified in the order be tried therein. Juries may be provided for the special term and cases be tried by them.

The place for holding the county court is also at the county seat. The times of meeting are fixed by the commissioners court of the county, but they must have as many as four sessions each year.

If the regular judge does not attend, a special one is procured as set out above. If the clerk or sheriff is not present either in person or by deputy, the judge appoints some one to fill the place.

When the court is organized for the term in legal contemplation it remains in session until the final adjournment. It takes recesses at the convenience of the officers and persons in attendance, but the term continues until all the business is disposed of and adjournment is had, or until the time fixed for the end of the term shall arrive. If the court is once regularly adjourned for the term, it can not lawfully be reopened for that term. The length of time which the court may remain in session at any term is often fixed by statute. In such cases, the court is adjourned by operation of law when the time expires, and it can lawfully do nothing thereafter until the next term arrives.

The exact place in the county seat in which the court shall convene, that is, the house and room, are left to the commissioners court, but if no place were provided, the judge could hold at some place in the county seat as convenient as the circumstances would admit.

An attempted court held at a time or place not authorized by law is a nullity.

CHAPTER VI.

CIVIL JURISDICTION OF DISTRICT AND COUNTY COURTS.

As a court is a special agency of the sovereign, it has authority to act for its principal only in such matters as having been lawfully committed to it. Jurisdiction to hear and determine one class of cases does not carry with it jurisdiction over others of a different nature. It is therefore highly important to ascertain the extent to which the sovereign has authorized the several courts created by it to act for it. As to all matters properly committed to any one of these courts, its final adjudication is binding and conclusive; as to any other matter, its decision is extrajudicial and void.

Article 5, section 1, of the present Constitution, adopted in September, 1891, is as follows:

“Section 1. The judicial power of this State shall be vested in one Supreme Court, in courts of civil appeals, in courts of criminal appeals, in district courts, in county courts, in commissioners courts, in courts of justices of the peace, and in such other courts as may be provided by law.”

The Court of Criminal Appeals, having no civil jurisdiction, does not come within the scope of this work.

This chapter will be confined to the civil jurisdiction of the district and county courts, not taking into consideration the jurisdiction of the Supreme Court, courts of civil appeals, probate, justices' and commissioners courts,—except as these may be involved in a discussion of the district and county courts.

CONSTITUTIONAL PROVISIONS REGARDING DISTRICT COURTS.

“Art. 5, Sec. 7. The State shall be divided into as many judicial districts as may now or hereafter be provided by law, which may be increased or diminished by law. For each district there shall be elected by the qualified voters thereof, at a general election, a judge, who shall be a citizen of the United States and of this State, who shall have been a practicing lawyer of this State or a judge of a court of this State for four years next preceding his election; who shall have resided in the district in which he was elected for two years next preceding his election; who shall reside in his district during his term of office; who shall hold his office for the period of four years, and shall receive for his services an annual salary of two thousand five hundred dollars, until otherwise changed by law. He shall hold the regular terms of his court at the county-seat of each county in his district at least twice in each year, in

such manner as may be prescribed by law. The Legislature shall have power by general or special laws to authorize the holding of special terms of the court, or the holding of more than two terms in any county for the dispatch of business. The Legislature shall also provide for the holding of district court when the judge thereof is absent, or is from any cause disabled or disqualified from presiding. The district judges who may be in office when this amendment takes effect shall hold their offices until their respective terms shall expire under their present election or appointment.

"Sec. 8. The district courts shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the State to recover penalties, forfeitures, and escheats; of all cases of divorce; of all misdemeanors involving official misconduct; of all suits to recover damages for slander or defamation of character; of suits for trial to title to land and for the enforcement of liens thereon; of all suits for the trial of the right of property levied upon by any writ of execution, sequestration, or attachment, when the property levied on shall be equal to or exceed five hundred (\$500) dollars; of all suits, complaints, or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars, exclusive of interest; of contested elections; and the said courts and the judges thereof shall have power to issue writs of *habeas corpus*, *mandamus*, injunction, and *certiorari* and all the writs necessary to enforce their jurisdiction. The district court shall have appellate jurisdiction and general control in probate matters over the county court established in each county, for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators, and guardians, and for the transaction of all business appertaining to estates; and original jurisdiction and general control over executors, administrators, minors, and guardians, under such regulations as may be prescribed by law. The district court shall have appellate jurisdiction and general supervisory control over the county commissioners court, with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law."

STATUTORY PROVISIONS REGARDING DISTRICT COURTS.

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"Art. 4098. The district court shall have original jurisdiction in civil cases—

"1. Of all suits in behalf of the State to recover penalties, forfeitures, and escheats.

"2. Of cases of divorce.

7—Pleading

"3. Of all suits to recover damages for slander or defamation of character.

"4. Of suits for the trial of title to land and for the enforcement of liens thereon.

"5. Of all suits for trial of right to property levied on by virtue of any writ of execution, sequestration or attachment, when the property levied on shall be equal to or exceed in value five hundred dollars; and

"6. Of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the amount in controversy shall be valued at or amount to five hundred dollars exclusive of interest.

"7. Of contested elections.

"Art. 1099. The district court shall also have appellate jurisdiction and general control in probate matters over the county court established in each county for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators, and guardians, and for the transaction of business appertaining to estates. The district court shall also have such original jurisdiction and general control over executors, administrators, guardians, and minors as is or may be provided by law. Such court shall also have such appellate jurisdiction and general control over the county commissioners court, with such exception and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or the Constitution, and such other jurisdiction, original and appellate, as may be provided by law.

"Art. 1100. The district court shall also have power to hear and determine all motions against sheriffs and other officers of the court for failure to pay over moneys collected under the process of said court, or other defalcation of duty in connection with such process, and of motions against attorneys for moneys collected by them and not paid over.

"Art. 1101. The district court shall also have power to punish by fine not exceeding one hundred dollars, and by imprisonment for not exceeding three days, any person guilty of contempt of such court."

"Art. 1106. Subject to the limitations stated in this chapter, the district court is authorized to hear and determine any cause which is or may be cognizable by courts, either of law or equity, and to grant any relief which could be granted by said courts, or either of them."

"Art. 1110. In addition to the foregoing powers and jurisdiction, the district courts and the judges thereof shall have such authority as is or may be vested in them by law."

CONSTITUTIONAL PROVISIONS REGARDING COUNTY COURTS.

"Art. 5, Sec. 15. There shall be established in each county of this State a county court, which shall be a court of record; and there shall

be elected in each county by the qualified voters a county judge, who shall be well informed in the law of the State, shall be a conservator of the peace, and shall hold his office for two years, and until his successor shall be elected and qualified. He shall receive as a compensation for his services such fees and perquisites as may be prescribed by law.

"Sec. 16. The county court shall have original jurisdiction of all misdemeanors of which exclusive original jurisdiction is not given to the justice's court as the same is now or may hereafter be prescribed by law, and when the fine to be imposed shall exceed two hundred dollars; and they shall have exclusive jurisdiction in all civil cases when the matter in controversy shall exceed in value two hundred dollars and shall not exceed five hundred dollars exclusive of interest, but shall not have jurisdiction of suits for the recovery of land. They shall have appellate jurisdiction in cases civil and criminal of which justices' courts have original jurisdiction, but of such civil cases only when the judgment of the court appealed from shall exceed twenty dollars, exclusive of cost, under such regulations as may be prescribed by law. In all appeals from justices' courts there shall be a trial *de novo* in the county court, and appeals may be prosecuted from the final judgment rendered in such cases by the county court, as well as all cases civil and criminal of which the county court has exclusive or concurrent or original jurisdiction in civil cases to the Court of Civil Appeals, and in such criminal cases to the Court of Criminal Appeals, with such exceptions and under such regulations as may be prescribed by law. The county court shall have the general jurisdiction of a probate court; they shall probate wills; appoint guardians of minors, idiots, lunatics, persons *non compos mentis*, and common drunkards; grant letters testamentary and of administration; settle accounts of executors; transact all business appertaining to deceased persons, minors, idiots, lunatics, persons *non compos mentis*, and common drunkards, including the settlement, partition, and distribution of the estates of deceased persons; and to apprentice minors as provided by law; and the county court or judge thereof shall have power to issue writs of injunction, *mandamus*, and all writs necessary to the enforcement of the jurisdiction of said court, and to issue writs of *habeas corpus* in cases where the offense charged is within the jurisdiction of the county court or any other court or tribunal inferior to said court. The county court shall not have criminal jurisdiction in any county where there is a criminal district court unless expressly conferred by law; and in such counties appeals from justices' courts and other inferior courts and tribunals in criminal cases shall be to the criminal district court, under such regulations as may be prescribed by law, and in all such cases an appeal shall lie from such district court to the Court of Criminal Appeals. When the judge of the county court is disqualified in any case pending in the county court, the parties interested may by consent appoint a proper person to try said case, or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law."

STATUTORY PROVISIONS REGARDING COUNTY COURTS.

"Art. 1154. The county court shall have exclusive original jurisdiction in civil cases when the matter in controversy shall exceed in value two hundred dollars and shall not exceed five hundred dollars, exclusive of interest.

"Art. 1155. The county court shall have concurrent jurisdiction with the district court when the matter in controversy shall exceed five hundred and not exceed one thousand dollars, exclusive of interest.

"Art. 1156. The county court shall also have jurisdiction to enter final judgment on all forfeited bonds taken in criminal cases pending in said court.

"Art. 1157. The county court shall not have jurisdiction of any suit to recover damages for slander or defamation of character, nor of suits for the recovery of lands, nor of suits for the enforcement of liens upon lands, nor of suits in behalf of the State for escheats, nor of suits for divorce, nor of suits for the forfeiture of the charters of incorporations and incorporated companies, nor of suits for the trial of rights to property levied upon by virtue of any writ or execution, sequestration, or attachment, when the property levied on shall be equal to or exceed in value five hundred dollars.

"Art. 1158. The county court shall have appellate jurisdiction in civil cases over which the justices' courts have original jurisdiction, when the judgment of the court appealed from or the amount in controversy shall exceed twenty dollars exclusive of costs.

"Art. 1159. The county court shall also have power to hear and determine cases brought up from the justices' courts under *certiorari* under the provisions of the title relating thereto.

"Art. 1160. The county court shall also have power to hear and determine all motions against sheriffs or other officers of the court for failure to pay over moneys collected under the process of said court, or other defalcation of duty in connection with such process.

"Art. 1161. The county court shall also have power to punish by fine not exceeding one hundred dollars, and by imprisonment not exceeding three days, any person guilty of contempt of said court.

"Art. 1162. Subject to the limitation stated in this chapter, the county court is authorized to hear and determine any cause which is or may be cognizable by courts either of law or equity, and to grant any relief which could be granted by said courts or any of them.

"Art. 1163. The county judge shall have authority, either in term time or in vacation, to grant writs of *mandamus*, injunction, sequestration, attachment, garnishment, *certiorari*, and supersedeas, and all other writs necessary to the enforcement of the jurisdiction of the courts."

"Art. 1165. In addition to the foregoing powers and jurisdiction, the county court and the county judge shall have such authority as is or may be vested in them by law."

The foregoing embrace all the constitutional and statutory provisions conferring jurisdiction on the district and county courts as such. The Legislature has taken from the county courts of a number of counties some of the jurisdiction pertaining to those courts as a class and conferred it on the district courts of the respective counties. These acts being local in their effect, can not profitably be referred to here.

The jurisdiction of the district and county courts is so closely related that it is impracticable to treat them separately, and we will consider them together, taking the constitutional and statutory provisions regarding the district court as the basis of our discussion, and referring to the corresponding provisions regarding the county court when it may seem necessary. We will then take up the provisions which are applicable alone to the county court.

It is a general principle, and one which has been uniformly applied in construing our Constitutions, that, where jurisdiction is given over cases involving designated kinds of subject matter, the grant is exclusive and such subject matter, without reference to its value, must be litigated in the court designated, unless a contrary intent is shown in the context. This principle is important, because the word "exclusive" and terms of similar import are rarely found in our constitution.

DISTRICT COURT—DETAILED CONSIDERATION.

"The District Court Shall Have Original Jurisdiction of all Suits in Behalf of the State to Recover Penalties, Forfeitures, and Escheats."

Suits in Behalf of the State.

These words have been construed in several cases, where suits were brought upon statutory bonds taken in the name of the State, but upon which the statute provided that actions might be maintained either by some individual, especially injured by violation of the conditions, or by the State, through the district or county attorney, for the benefit of the county. The first of these cases is *Grady v. Rogan*, decided in 1884.¹

In it the Court of Appeals held that the county court had jurisdiction under the statute as it then stood; but after the act of 1887, the same court held in the case of *State v. Stoutsenberger*² that the county court did not have jurisdiction. The question came before the Supreme Court in the case of *State v. Eggerman*, decided on June 26, 1891.³ This was a suit on a five hundred dollar bond, begun in the district

¹ 2 Texas App. C., sec. 259.

² 16 S. W., 304.

³ 81 Texas, 569, 16 S. W., 1067.

court and dismissed by that court for lack of jurisdiction. The Supreme Court, through Judge Stayton, says: "It is contended that this is not a suit in behalf of the State, and this proposition seems to be based upon the fact that, if the penalty is enforced, it will inure to the benefit of Parker county. The word *behalf* means 'in the name of,' 'on account of,' 'benefit,' 'advantage,' 'interest,' 'profit,' 'defense,' 'vindication,' and in any of these senses this is evidently within the meaning of the Constitution, a suit in behalf of the State. That the penalty, if recovered, will inure to the benefit of a county is a matter of no importance; but if it were necessary to look to the use to which the penalty would be applied, if collected, in order to determine whether such suit were in behalf of the State, it could not be held that the appropriation made by the statutes of the sum to be collected, or penalties under it, was not for the benefit of the State, although used in and by one of its municipal subdivisions for purposes in which people of the State are all more or less interested."

There is no later case on the subject.

Penalties.

The case of *Aulanier v. Governor*⁴ decides that a suit to recover one hundred dollars penalty for selling spirituous liquors without proper license was within the exclusive jurisdiction of the district court. It further holds that such a proceeding begun in the justice's court and appealed to the district court, to which appeals from the justices' courts were then taken, was not within the jurisdiction of the district court, although the trial therein was *de novo*; for, since the court from which the appeal was taken was without jurisdiction, the whole proceeding in both courts was void. In the case of *State v. San Miguel*,⁵ the court of Civil Appeals of the Fifth District held that the district court had jurisdiction of a suit by the State for two hundred dollars penalty for breach of a peace bond. In *State v. Schuenemann*,⁶ the same Court of Civil Appeals reiterates the doctrine that a suit on a statutory bond is for a penalty, and, as a consequence, holds that the suit abates on the death of the principal in the bond and can not be prosecuted further against the sureties and administrator of the principal.

Forfeitures.

Our Supreme Court has adopted this definition of forfeiture. "Forfeiture is where a person loses some property, right, privilege, or benefit, in consequence of having done or omitted to do a certain act."⁷

Whatever the nature or value of the "property, right, privilege, or

⁴ 1 Texas, 667.

⁵ 4 Texas Civ. App., 182, 23 S. W., 389.

⁶ 46 S. W., 260.

⁷ *State v. De Gress*, 72 Texas, 245, 11 S. W., 1028.

benefit" may be, if the State desires to have its loss adjudged, it must bring its action in the district court. The most frequent exercise of this jurisdiction is as to the franchises and rights of corporations and public offices. The statutes regulating proceedings of this nature are quite full. All of them conform to the Constitution as to jurisdiction. In several instances the venue is fixed in Travis County. The methods of procedure under these will be further considered under appropriate heads.

When, under the State statutes, a suit is brought in the district court of the State to forfeit the charter of a domestic corporation the jurisdiction of the court is not ousted by subsequent appointment of a receiver of the property of such corporation by a Federal court, and actual charge and possession of the property of the concern by the receiver.⁸

Escheats.

Anderson's Law Dictionary gives the following definition of escheat: "In United States, a reversion of property to the State, in default of a person who can inherit it." In *Hughes v. State*,⁹ our Supreme Court says: "Title to land by escheat originated in and was a consequence of feudal law, whereby, upon failure of heirs of the person last seized, who may lawfully take the estate by succession, it fell back or reverted to the original grantor, his descendants, or successors. And, as under the general doctrine of tenures in the American States, the State occupies the place of the feudal lord by virtue of its sovereignty, it is universally asserted that, when the title to land fails for lack of heirs or devisees who may lawfully take, it reverts or escheats to the estate as property to which it is entitled. This has certainly been the law of tenure in Texas from the organization of the government."

The district court has exclusive jurisdiction over all suits for determining the existence of such a state of facts as shows reversion to the State, and for pronouncing judgment in favor of the State thereon. This jurisdiction however, can only be exercised in the manner and under the conditions prescribed by the legislature.¹⁰

Suits for Divorce.

The jurisdiction of the district court is in these cases exclusive. Neither the Constitution nor the laws of the State of Coahuila and Texas expressly conferred upon any court the power to grant divorces.

⁸ *Water and Power Co. v. City of Palestine*, 91 Texas, 540, 44 S. W., 815.

⁹ 41 Texas, 17.

¹⁰ Constitution of 1876, art. XIII, sec. 1; Rev. Stats., art. 1821, et seq.; *Wiederanders v. State*, 64 Texas, 134.

Nor did the Constitution of the Republic, nor any act of Congress, prior to the passage of the Judiciary Act of December 18, 1837. The last named act provided:

"That in addition to the powers given to the district courts by the acts establishing the powers and jurisdiction thereof, approved December twenty-second, one thousand eight hundred and thirty-six, the said district courts shall have power to hear and determine all suits or actions arising between the husband and wife, for divorce or for a separate maintenance, and may decree divorces, as well from the bonds of matrimony as from bed and board, or for a separate maintenance."¹¹

It is noticeable that there is in this act no specification of any grounds for divorce.

The first divorce suit heard in our Supreme Court is *Andrews v. Andrews*,¹² decided January term, 1840. The report of the case does not show when the suit was instituted, but in the opinion the act above referred to is cited and relied upon.

In 1841 an act was passed, which was very full and explicit in its provisions as to grounds for divorce.¹³ In the Constitution of 1845, the district courts are given original jurisdiction over all cases of divorce.

In the case of *Wright v. Wright*,¹⁴ the court says: "The question presented is whether there is any fact well pleaded in the petition which would be sufficient in law to dissolve the bonds of matrimony?"

"There were some suggestions in the argument relative to the extent of the powers of the courts over matrimonial causes, which will not, in this case, require any particular examination. The statute defines the grounds of divorce; and whatever diversity of opinion may be entertained as to the authority of a district court to annul a marriage for causes arising antecedent to its celebration other than that of incurable impotency which is expressed in the statute, it will be conceded that for causes subsequently arising the power of the court is restricted to the grounds prescribed in the statute."

There is a very full discussion of matters of divorce in the case of *Sharman v. Sharman*,¹⁵ decided in 1857. In this opinion, the Spanish laws on the subject are given and their inapplicability to the conditions and jurisprudence of Texas after its independence are pointed out. The statement is made that under the Republic, and prior to the Act of 1837, divorces were probably granted by district courts; but the matter is not definitely determined. The Act of 1837 is contrasted with that of 1841, and it is decided: "That this latter act has been understood as defining and presenting the cases in which divorce should be granted,

¹¹ Acts of 1837, sec. 2, p. 95.

¹² Dall., 375.

¹³ Acts of Congress, 1841, p. 19, et seq.

¹⁴ 6 Texas, 15 (1851).

¹⁵ 18 Texas, 522.

and it is construed that grant of jurisdiction in the State Constitution over cases of divorce does not enlarge the power given by statute."

The Act of 1841, although it has undergone some modifications, is the basis of our present statute; and the general principle that the expression of the legislative will that divorces may be granted for specified causes is a denial of the right of the court to grant for other causes, has ever since been recognized.¹⁶

Slander and Defamation of Character.

Exclusive jurisdiction over civil suits for slander and libel was first given to the district court by amendments made to the Constitution in 1861. Prior to that time, the jurisdiction of such cases depended upon the amount of damage claimed; since that the jurisdiction has been exclusively in the district court. These terms, slander and defamation of character, are used in the ordinary legal sense including both oral defamation and libel, and require no special elucidation. "Damages," of course, refers to compensation to be made to the injured party, recoverable in a civil suit. Prosecutions for criminal slander and libel must be instituted in the county court.

The Trial of Title to Land.

No equivalent clause appears in any Constitution of Texas earlier than the amended Constitution of 1866, in which the language used is, "all suits for the trial of title to land," identical with the present terms except the omission of the article before the word "trial." This jurisdiction, however, has been exclusively in the district courts since the organization of the Republic. While the Constitution of the Republic was silent on the subject, and while the district court acts did not, in express terms, give exclusive¹⁷ cognizance of such suits to the courts therein established, the grant of authority is broad enough to include it, and did, in fact, do so. By the sixth section of the county court act, passed at the same session of Congress, jurisdiction of such cases was expressly denied to the county court. There were no county courts organized under the Constitution of 1845 with any civil jurisdiction except in probate matters; and except for a short time, under the Constitution of 1866, no such courts existed until after the Constitution of 1876 went into effect. I have found no case decided during the existence of the Republic in which this clause is con-

¹⁶ Rev. Stats. 1895, art. 2976, et. seq.

¹⁷ Laws of the First Congress, p. 200.

sidered. The numerous and interesting decisions construing it are all comparatively recent.

Two important questions are presented: First, what is land; and second, what character of suits are those which, in legal contemplation, are for the trial of title thereto?

Land Defined.

No definition of the word land, made with direct reference to this clause, appears in our reports. In *Missouri Pacific Railway Company v. Cullers*,¹⁸ in passing upon the powers of the court to adjudge the rights of the parties litigant therein—the cause of action having arisen in the Indian Territory—it became necessary to determine the exact meaning of the word. The court adopted the definition given by Mr. Tiedeman in his work on Real Property, as follows: “Land is the soil of the earth, and includes everything erected upon its surface or which is buried beneath it. Under the term land, therefore, are included the buildings made so under the doctrine of accession. * * * The general rule of law is that a permanent annexation to the soil of a thing in itself personal makes it a part of the realty. The rule applies in some cases even where the thing annexed is the personal property of another. Thus, if a stranger erects a building upon the land of another, having no estate therein, the building becomes the property of the owner of the soil. * * * But if such erection is in pursuance of a license granted by the owner of the soil, the annexation will not make the building or structure a part of the realty.” In the case of *Irrigation Ditch Company v. Hudson*,¹⁹ the meaning of this word in the statute providing for the condemnation of land for the benefit of irrigation companies, is given by the court as follows: “The word *land* includes not only the soil, but everything attached to it, whether by course of nature, as trees, herbage and water, or by the hand of man, as buildings and fences.”

Whether or not fixtures are a part of the realty is a mixed question of law and fact to be determined in each case by the relation of the parties, who erect or attach same as well to each other as to the land, and also by the intent with which the attachment is made.²⁰

Land also includes easements.²¹ As defined by these authorities, land

¹⁸ 81 Texas, 390, 17 S. W., 19.

¹⁹ *Irrigation Ditch Co. v. Hudson*, 85 Texas, 592, 22 S. W., 398.

²⁰ *Hutchins v. Masterson*, 46 Texas, 554; *Moody v. Aiken*, 50 Texas, 72; *Sinker, Davis & Co. v. Comparet*, 62 Texas, 476; *Cullers v. Jones*, 66 Texas, 498; *Jones v. Bull*, 85 Texas, 139, 19 S. W., 103; *Railway Co. v. Dunman*, 85 Texas, 182, 19 S. W., 1073; *Railway Co. v. Dunman*, 33 S. W., 1025; *Railway Co. v. Dunman*, 35 S. W., 947.

²¹ *Brown v. Foland*, 1 W. & W. C. C., sec. 1022; *Shepard v. Railway Co.*, 2 Texas Civ. App., 579.

is equivalent to real property and may be taken as comprising all those material substances which constitute the earth's surface, including the soil, rocks, minerals, oils, and other substances in the ground; water in or standing on it; trees and other natural vegetation attached to the soil; all permanent improvements and structures erected on the soil by the owner or others, with the intent to permanently attach the same to the soil and make it a part of the realty; and all easements—but not privileges in land of another enjoyed under license merely and not constituting easements.

Trial of Title.

The language used in the Constitution denying this jurisdiction to county courts is, "suits for the recovery of land." The decisions are not entirely harmonious as to the proper construction of these clauses, but by careful comparison it may be possible to reach a correct general rule.

Nearly all the decisions upon this question are by the Court of Appeals, under the Constitution of 1876, and the Courts of Civil Appeals, under the Constitutional Amendment of 1891. No provision was made for review by the Supreme Court of the decisions of the first of these courts on any matters, and none for review of judgments by the second in appeals to them from the judgments of county courts, consequently these questions rarely come before the Supreme Court. There are, however, one or two decisions on the subject by that tribunal.

The first case on these questions is *Greenwood v. Walls*, decided by the Court of Appeals, February 2, 1881.²² The whole opinion on the subject is: "The county court has no jurisdiction of a suit to remove cloud from title to land."

Bean v. Toland, decided by the same court on March 9, 1881,²³ holds that ordinarily a house built upon land becomes part of the realty, and if in any case circumstances exist which prevent the operation of this general rule and cause the house to be personalty, such circumstances must be averred in a suit in the county court, asserting title to the house, otherwise the court will not have jurisdiction. In the course of the opinion the court says: "The value of the land in controversy is immaterial. Whatever may be its value, when the title is to be passed upon and determined, the county court has no jurisdiction, and should it assume the power, its adjudication in such case would be *coram non judice* and void."

*Scripture v. Hunt*²⁴ gives an exhaustive discussion of this subject. It takes up the several statutory and constitutional provisions re-

²² 1 W. & W. C. C., sec. 116.

²³ 1 W. & W. C. C., sec. 1022.

²⁴ *Id.*, 1056.

garding jurisdiction of the district courts as to these matters, and after comparison concludes that the terms used in the constitutional grant of authority to the district court, viz., "trial of title to land," and in the denial to the county court of jurisdiction over "suits for recovery of land," are legally equivalent.

In *Cross v. Peterson*²⁵, decided on June 22, 1881, the same court ruled that a homestead right or claim in property was a "title to land" within the meaning of the Constitution, and hence a county court could not grant an injunction to protect such a claim from forced sale.

In *Gulf, Colorado & Santa Fe Railway Company v. Graves*,²⁶ decided on October 25, 1882, a distinction is made between a suit to determine and adjudge title to land and easements, and a suit to recover damages for injury to the land or easement. While jurisdiction is denied to the county court in the former, it is sustained in the latter.

In *Owens v. Prather*,²⁷ decided June 8, 1881, this language is used: "The Constitution says the county court shall not have jurisdiction of 'suits for the recovery of land,' but that would not deprive them of the right to try suits for trespasses upon land, or cutting and removing timber from it, or for rent or use and occupation of it. In suits of this character it may be very material for the party to prove his title to the land, that he may recover for the trespass or the damages, but he does not sue for or recover the land, nor does any judgment which may be rendered in the county court determine his right to the land, or in the least affect the title to it."

In *Porter v. Porter Bros.*,²⁸ decided November 12, 1884, was presented the question, has the county court jurisdiction to determine whether the amount due on an insurance policy on a homestead which has burned can be garnished or is exempt from such process? It was held that the court had jurisdiction, and the following propositions on the subject were announced:

1. When the original suit as brought shows an action that necessarily involves the question of title to real estate, the county court has no jurisdiction.
2. When the issues raised are not dependent on the issues of title, but on other rights, such as the character of possession of real property, the county court has jurisdiction.
3. When the contest is over other matters incidentally dependent upon the question of title the county court has jurisdiction.

The accuracy of the first of these statements in the light of subsequent decisions is very doubtful.

²⁵ *Id.*, 1061.

²⁶ *Id.*, 579.

²⁷ *Owens v. Prather*, *Id.*, 1131.

²⁸ *Porter v. Porter Bros.*, 2 Willson C. C., 433.

Gulf, Colorado & Santa Fe Railway Company v. Thompson,²⁹ decided February 25, 1885, is a suit for damages to an easement. The court says: "The cases of *Gascamp v. Drews* and of *Scripture v. Kent* were suits to recover or impose easements upon land; but such is not the nature of the relief sought in this action. This is not on a claim 'to recover' land, but to recover damages for injury done to land, and in such cases the county court has jurisdiction where the amount claimed is within the jurisdiction."

Harvey v. Milliken,³⁰ decided May 31, 1884, is an interesting discussion of the question whether or not a house is realty.

Bohl v. Brown,³¹ decided February 14, 1885, holds that a suit to foreclose a mortgage upon a house erected on leased land is, in absence of special facts showing the house to be personalty, a suit involving the title to real estate, and therefore the county court is without jurisdiction.

Brown v. Brown,³² decided January 27, 1886, holds that in an action for damages to realty by trespass thereon title to the land is not involved and the county court has jurisdiction where the amount of damages is between two hundred and one thousand dollars.

Carter Lumber Company v. Crozier,³³ decided November 17, 1886, is a suit in which attachment was levied on realty. The defendant claimed that the real estate levied on under the attachment was his homestead, and therefore exempt. It was held that the county court was without jurisdiction to determine this plea.

Hatch v. Allan & Swartz,³⁴ decided January 29, 1887, holds that, "That which is claimed in the petition and prayer for relief must determine the character of the suit and court which has jurisdiction. That a question as to title to land may incidentally arise in the suit will not deprive the county court of jurisdiction in a suit for damages."

Mahoney v. Lapouski Bros.,³⁵ decided May 28, 1887, holds that an agreement between parties owning adjoining lots that one will build a party wall, half of which was to be on each lot, and the other, at such time thereafter as he should build to the wall, would pay half the cost of construction thereof, was binding in equity upon the party agreeing to pay half the cost, and upon his assignees who took the property with notice and built to the wall; and that a suit to recover one half the cost from the assignees did not involve the title to the land and the county court had jurisdiction.

²⁹ *G. C. & S. F. Ry. Co. v. Thompson*, 2 Willson C. C., 568.

³⁰ *Harvey v. Milliken*, 2 Willson C. C., 222.

³¹ 2 Willson C. C., 485.

³² 3 Willson C. C., 82.

³³ *Carter Lumber Co. v. Crozier*, 3 Willson C. C., 177.

³⁴ 3 Willson C. C., 229.

³⁵ *Mahoney & Evans v. Lapouski Bros.*, 3 Willson C. C., 307.

Williams v. Fenit,³⁶ decided November 7, 1877, holds that an action for breach of warranty of title to land is "neither a suit for the recovery of land, nor for the trial of title to land, and the amount sued for being within the jurisdiction of the county court, suit was properly brought in that court." This is approved in *McGregor v. Taylor*, April 25, 1894;³⁷ also in *Patrick v. Laprelle*.³⁸

In *Messer v. Bosselt*,³⁹ decided March 5, 1892, is a case in which one of the parties had sold to the other a tract of land and had agreed, as a part of the contract of sale, to resell to him at a stipulated price or to take back the land and to pay him the amount of money paid for the land and his expenses. This contract was broken by the vendor, and the vendee tendered a reconveyance of the land and repayment of the purchase money. Defendant pleaded to the jurisdiction of the county court because the suit involved the title to land, and that court sustained the plea. The Court of Appeals reversed the judgment, holding that the county court had jurisdiction.

These are all the decisions of the Court of Appeals on this question. The Court of Civil Appeals has had the matter under consideration a number of times, and their decisions do not seem to be consistent. They are as follows:

Gentry v. Bowser et al.,⁴⁰ decided in February, 1893, is a case in which the defendant was the head of a family and had a country homestead, to which was permanently attached certain machinery—gin, steam engine, etc. He gave a chattel mortgage on this machinery to secure plaintiff in a debt of two hundred and seventy-one dollars. Suit was brought in the county court for the debt and foreclosure of mortgage. Defendant pleaded to jurisdiction, that at the time the mortgage was given and the suit brought the machinery was part of the realty. It was held that the plea was good and deprived the court of jurisdiction to foreclose the mortgage.

Edwards v. Heffly,⁴¹ decided May 31, 1893, is a suit in which a tract of land had been sold by the plaintiffs, and thirteen acres of it was recognized as in conflict with another tract. The purchase money at the rate of \$8 per acre was retained by the vendee, and bond given "conditioned that in case the said G. W. and E. A. Heffly (the plaintiffs) maintained their title and possession to said thirteen acres of land, and shall place the said Edwards and Wilkie (defendants) in the lawful and

³⁶ *Williams v. Fenit*, 1 W. & W. C. C., 519.

³⁷ *McGregor v. Taylor*, 26 S. W., 443.

³⁸ *Patrick v. Laprelle*, 40 S. W., 552.

³⁹ *Messer v. Bosselt*, 4 Willson C. C., 298.

⁴⁰ 2 Texas Civ. App., 388.

⁴¹ 3 Texas Civ. App., 465.

peaceable and undisputed and adverse possession thereof under superior title," etc., then the sum so reserved should be paid. No suit was brought in the district court to determine the question of title, but suit was brought on the bond in the county court. The Court of Civil Appeals held that there was no breach of the bond alleged, and that the superiority of the title to the land could not be shown in the county court, although the defendants were then in possession of the thirteen acres. In the opinion the court uses this language: "But when the gist of a cause of action, whether in form of trespass to try title or in any other form, rests upon the proposition that the title to the land asserted by the plaintiff is superior to that of the defendant, the district court alone has jurisdiction to adjudicate the matter. *Cross v. Peterson*, 1 W. & W. C. C., sec. 1061; *Carter Lumber Co. v. Antonio de Grazier*, 3 Willson's C. C., sec. 177; *Scripture v. Kent*, 1 W. & W. C. C., secs. 1056, 1057. The county court could not adjudicate the question of title as involved in this case. If a district court judgment had been produced showing an adjudication of the title in favor of the Heffleys, the county court could have rendered judgment on the bond."

In *Myers v. Jones*,⁴² decided October 18, 1893, this question was presented in a peculiar form. The action was one of trespass to try title to sixty-five acres of land in Wichita County. The defendants asserted, among other things, title under a judgment of the county court of Milam County, which attempted to adjudge to the defendants certificates upon which the land was located. This suit in the county court was begun before the location of the certificate, and the location was made while the suit was pending. The court says: "We incline to the opinion that the judgment rendered by the County Court of Milam County after the location of this land, although the suit was commenced before such location, was a nullity as to it, and there was, therefore, no error as to its exclusion by the court below. The language of the Constitution is, that the county court shall not have jurisdiction of any suit 'for the recovery of lands, nor of suits for the enforcement of liens upon land,' and we think that after the location of the certificate, that suit became, in effect, a suit for the recovery of land, of which the county court no longer had jurisdiction. This of course, does not apply to that part of the certificate unlocated at the time of the rendition of the judgment."

Victoria v. Schott,⁴³ decided January 31, 1895, was a suit brought in the county court by Mrs. Schott against the city of Victoria for value of certain gravel removed from land claimed by her and for damages to the land. The city plead to the jurisdiction, on the point that Mrs. Schott's right to recover could only be established by proving her title to the land. This point was overruled by the court. The city then plead

⁴² 4 Texas Civ. App., 330.

⁴³ 9 Texas Civ. App., 332.

title in itself to the land and consequently no liability to Mrs. Schott. This plea the court struck out. Judgment was rendered for Mrs. Schott, and the city appealed. Judge Williams, in delivering the opinion of the Court of Civil Appeals, says: "The case made by the petition was one of which the county court had jurisdiction. The suit was for a sum of money within the jurisdiction of the court, and the fact that the liability arose from trespass upon plaintiff's land did not affect the power of the court to adjudicate upon it. The suit was not one 'for the trial of title to land,' nor 'for the recovery of land.' The two expressions used in the Constitution in defining the jurisdiction of the district and county courts are evidently intended to convey the same meaning, and have reference to cases where the title to land is to be determined or its recovery had by the judgment sought.

"In actions for a debt or damages in amounts within the jurisdiction of the county courts, the right of recovery may depend upon the title to land. The court having the power, expressly given, to determine such right to recover, must decide all questions of law and fact upon which its determination depends. Thus the question of title comes incidentally into the case, and must be decided before the court can render judgment settling the claims in dispute. But in doing so it does not adjudicate or settle the title to the land nor the right to recover it, but simply determines that the plaintiff is or is not entitled to recover the thing sued for, within the jurisdiction.

"In the present case, if plaintiff owned the land, she had the right to recover for the trespass upon it. On the other hand, if defendant owned the land, or if plaintiff did not own it, defendant was not liable to plaintiff for taking gravel. Of course either party may have rights in the land, growing out of the right to possession and not depending on the question of title, but they are not involved in this case.

"The sustaining of exceptions to defendant's answer was therefore erroneous. As plaintiff had the right to prove ownership in order to recover, defendant was entitled to disprove that fact or to show ownership in itself in order to defeat recovery. 1 W. & W. C. C., sec. 579; *Id.*, secs. 1057, 1061, 1132; 2 Wills. C. C., secs. 95, 434, 568; 3 *Id.*, secs. 82, 177, 229."

The case of *Donenhauer v. Devine*,⁴⁴ decided by the Supreme Court in 1879, is a suit by the owner of one lot to enforce an agreement by the owner of an adjoining lot not to leave windows in a party wall between the lots. No amount of damage was fixed in the pleading and proof. The question of jurisdiction was raised, and the court says: "In regard to the question of jurisdiction of the district court, our opinion is, that the nature of the suit, the injury complained of, and the relief sought were such as to give the district court jurisdiction, independent of the

⁴⁴ 51 Texas, 480.

amount of injury alleged. The title and possession of land were so far involved as to make the case one for the district court."

It is a general rule that a suit to set aside a judicial sale for irregularities in the proceedings must be brought in the court from which the process issued.⁴⁵ When, however, the judgment is rendered in the justice's court and process on which sale is made issues therefrom, it is held that this rule does not apply, but that the defendant may raise the issue in the suit by the purchaser for the land in the district court.⁴⁶

In these cases no question of laches arose, as there had been no delay.

The opinions do not say anything as to the county court's jurisdiction of such cases but the reason given for denying it to the justice's court viz., that "that court does not have jurisdiction, where the title to land is in litigation, to hear and determine the questions," apply equally to the county court.

*Nixon v. Grove*⁴⁷ is a suit brought in the district court in which the vendee in a land sale desired to rescind on ground of fraud in vendor as to the quality of the land. The amount of purchase money which vendee had paid was \$250. He was in possession of the deed from vendor, but prayed to have it canceled. Jurisdiction seems to have been claimed in the district court, because the rescission and cancellation of the contract involved title to the land. The court held that rescission on the grounds upon which it was sought did not involve the issue of title, and that the prayer for cancellation of the deed was manifestly surplusage, since the party had possession of the deed and could not possibly have been injured by its continued existence, and jurisdiction of the district court was denied.

The rules established by these cases seem to be: That the expression "trial of title to land," as used in the district court clause of the Constitution, and "recovery of land," as used in the county court clause, are synonymous. That the district court has exclusive jurisdiction of all suits which directly involve the title to land; but that, in cases in which the question of title is only incidentally involved, jurisdiction depends upon the amount in controversy. That the test as to whether the title is directly or indirectly involved is *will the determination of the issues raised affect the title to the land?* If so, the title is *directly* involved; if not, *indirectly*. In other words, if the judgment sought would be *res adjudicata* as to the ownership of the land, the district court alone has jurisdiction; but if the judgment would not have that effect, the case must be tried in the court having jurisdiction of the amount involved,

⁴⁵ *Miller v. Koertge*, 70 Texas, 167 (1888), 7 S. W., 691.

⁴⁶ *Weaver v. Nugent*, 72 Texas, 277, 10 S. W., 458; *Smith v. Perkins*, 81 Texas, 152, 16 S. W., 805.

⁴⁷ 59 Texas, 573.

even though, in the trial, the court must pass for the purposes of that litigation upon the question of title.

The form of the action is immaterial. It may be trespass to try title, an action to remove cloud from title, or an action of any other character; if the action will determine and adjudge who among the parties to the suit owns the land, so that such judgment could afterwards be used as evidence of ownership, then the district court has exclusive jurisdiction. Otherwise it has not.

Suits for Enforcement of Liens on Land.

The word *land* has the same meaning here as in the preceding clause.⁴⁸ There was no express constitutional or statutory provision equivalent to this prior to the Constitution of 1860. It has been retained in all the Constitutions since that time. Before that date the decisions had declared the jurisdiction of such cases to be exclusively in the district court.⁴⁹ Under the Constitution of 1876, the Court of Appeals decided that the clause extended to all liens on real estate, whether acquired by legal process during the progress of the suit in which the foreclosure was asked, or otherwise; and denied the jurisdiction of the county and justice courts to foreclose attachment liens on land.⁵⁰

The Supreme Court, however, came to a directly opposite conclusion as to attachment liens, and limited the operation of the provision to those liens which were existing at the time the suit was instituted and for the foreclosure of which the suit was brought, whether dependent upon contract, statute, or the levy of legal process and those arising subsequently in any way except by the levy of process in that particular suit (i. e., to all such liens as, under the rules of practice must be alleged and proved in order to entitle the lienor to a judgment of foreclosure); and sustained the power of the county and justice courts to foreclose all such liens as grew out of, or were incidental to, the suit in which the judgment of foreclosure was entered.⁵¹

The difference between the courts was irreconcilable, and the Legislature came to the relief of the situation by the enactment of a statute⁵² to the effect that, when an attachment was levied on real estate in the progress of a suit in the county or justice court, it should not be neces-

⁴⁸ T. & P. R. R. Co. v. McMullen, 1 W. & W. C. C., sec. 161, et seq.

⁴⁹ Hargrove v. Simpson, 25 Texas, 396.

⁵⁰ Shandy v. Conrales & Logeman, 1 W. & W. C. C., sec. 238; Newton v. Heidenheimer, 2 Willson C. C., sec. 126; Rowan v. Shepard, Stevens & Co., 2 Willson C. C., sec. 297.

⁵¹ Hildebrand v. McMahon, 59 Texas, 450.

⁵² Acts 19th Leg., p. 73; Sayles' Stats., art. 180a.

sary for the judgment entered to foreclose the lien thereby acquired, but that the lien should be preserved by a mere recitation in the judgment of the facts of the levy and the existence of the lien, and that sale of the property attached made under such judgment should pass all the title and interest levied on under such attachment.

Upon the organization of the Courts of Civil Appeals, under the amendments of 1891, these courts followed the rule as announced by the Supreme Court in the case of *Hildebrand v. McMahon*, and this is now the settled law upon the subject.⁵³

As in these cases, when the amount in controversy is five hundred dollars or less, the jurisdiction of the district court depends upon the existence of the lien, if the plaintiff fails to prove the lien the court can not enter judgment for the debt.⁵⁴ This seems to be contrary to the general rule for determining jurisdiction by facts properly pleaded by plaintiff in good faith, but the decisions are unmistakable.

"Of all Suits for Trial of Right of Property Levied on in Virtue of any Writ of Execution, Sequestration, or Attachment, When the Property Levied on Shall be Equal to or Exceed in Value \$500."

The trial of right of property is a statutory action provided for persons who assert rights of possession in personal property which has been levied on under a writ to which they are not parties. It affords a summary method for determining the possessory rights of the claimant in the property, and frequently practically settles the question of title. To entitle one to this action he must present to the officer making the levy a written statement of his claim verified by affidavit, and a bond; and when these papers are properly prepared and presented, the officer indorses on them the value of the property as estimated by him, and surrenders the property to the claimant, and returns the writ, claim, and bond with his indorsement to the court of the county from which the writ issued having jurisdiction to try the claim thus made.

This clause of the Constitution applies only to the trial of these statutory actions,⁵⁵ and to those only when the levy is made under one of the three writs named in it.⁵⁶ When the levy is under either of those writs (attachment, sequestration, or execution), and the amount is just \$500, or over that, jurisdiction to hear this statutory action is exclusively in

⁵³ *Grizzard v. Brown*, 2 Texas Civ. App., 584, 22 S. W., 252.

⁵⁴ *Snyder v. Wiley & Porter*, 59 Texas, 448; *Cameron & Co. v. Marshall*, 65 Texas, 7; *Carter v. Hubbard*, 79 Texas, 356, 15 S. W., 392.

⁵⁵ *Morrow v. Short*, 3 Willson C. C., 54.

⁵⁶ *St. Louis Type Foundry v. Taylor*, 6 Texas Civ. App., 732, 26 S. W., 226.

the district court.⁵⁷ When the sheriff has indorsed the estimated value of the property on the bond, this value is conclusive on question of jurisdiction.⁵⁸ When the officer fails to make such indorsement, the jurisdiction is determined by the value stated in the affidavit and bond.⁵⁹

The Constitution and statutes as construed fix the jurisdiction of the several courts in these statutory actions as follows: The jurisdiction of the justice court is exclusive, when the value of the property levied on is two hundred dollars or less; the jurisdiction of the county court is exclusive, when the value of the property is over two hundred dollars and less than five hundred dollars, without reference to the writ under which the seizure is made, or where the value is just five hundred dollars and the seizure is not under any of the writs mentioned in the Constitution—attachment, sequestration, or execution; the jurisdiction of the district court is exclusive, where the value is over one thousand dollars without reference to the writ under which the levy is made, or where the value is just five hundred dollars or over when the levy is made under any of the writs mentioned in the Constitution. The jurisdiction of the district and county courts is concurrent when the levy is made under some writ not mentioned in the Constitution and the amount is over five hundred and not more than one thousand dollars.

"Of all Suits, Complaints, or Pleas Whatever Without Regard to any Distinction Between Law and Equity, When the Matter in Controversy Shall be Valued at or Amount to \$500, Exclusive of the Interest."

Of all Suits, Complaints, or Pleas Whatever.

These words have been in every Constitution of the State of Texas, and have been construed in numerous cases prior to 1891. In one of the most important of these,⁶⁰ decided under the Constitution of 1876, Chief Justice Roberts says:

"A case is defined to be a question contested before a court of justice; an action or suit in law or equity. *Martin v. Munter's Lessee*, 1 Wheat., 352; *Osborn v. U. S. Bank*, 9 Id., 819; 9 Pet., 224.

"A suit is defined to be the prosecution of some demand in a court of justice. *Cohen v. Virginia*, 6 Wheat., 407; *Wayman v. Southard*, 10 Id., 30.

⁵⁷ *Erwin v. Blanks*, 60 Texas, 583; *Cleveland v. Tufts*, 69 Texas, 580, 7 S. W., 72; *Carney v. Marsalis*, 77 Texas, 63, 13 S. W., 636; *Betterton v. Echols*, 85 Texas, 212, 20 S. W., 63; *Wetzel v. Simon*, 87 Texas, 403, 28 S. W., 942.

⁵⁸ *Cleveland v. Tufts*, and *Carney v. Marsalis*, *supra*.

⁵⁹ *Lemon v. Borden*, 83 Texas, 620, 19 S. W., 160.

⁶⁰ *Ex Parte Towles*, 48 Texas, 413.

“The district court is, therefore, a tribunal for the trial of suits or cases in which there are usually contesting parties; some valuable right recovered or adjudged; a judgment of record, and execution to enforce it. Such is the general character stamped upon it by the Constitution.

“There are cases that may be brought in the district court wanting in some of these elements of the jurisdiction. For instance, an escheat may be in a suit by the State for property, without an opposing party. Proceedings *in rem* might also come within its jurisdiction under laws authorizing them, without any opposing party being cited, either property or a recognized legal status being the object of the suit. 1 Greenl., sec. 525. *Habeas corpus* is an *ex parte* proceeding but is always founded on some deprivation of legal right.

“In some of the grounds of jurisdiction, any particular amount in the value of the subject matter is not required; as suits for trial of the title to land. And there may be others not enumerated,—for instance, suits, or motions, or other proceedings in the nature of suits, growing out of, and incidental to judgments already rendered in the district court. It may also be a subject matter of such nature as that a suit can be entertained in the district court, irrespective of the amount involved, as in case of divorce, to establish the legal status of the party; in which also there will be no need of an execution to enforce the judgment.”

This case and others to the same effect⁶¹ establish the proposition that suits, complaints, or pleas, under our former Constitution, did not include abstract or speculative questions, or questions of any kind except those involving controverted legal rights between parties, usually of ascertainable money value, but occasionally lacking this last element, which controversies were capable of being heard and decided as between the parties litigant, in such way that the determination could be enforced by some order or process from the court. The retention of the language in the present Constitution after those decisions, under well established rules of construction, is an adoption of the interpretation given in them, so that no claim for enlarged powers in our present courts can be legitimately sustained by giving to this clause any different meaning. Recognizing this, the framers of the Constitutional amendments have sought to obviate the practical difficulties under the old Constitutions by adding other clauses, which will be subsequently considered.

Without Regard to any Distinction Between Law and Equity.

Under the common law of England, as that term is used in America, are embraced two distinct systems of remedial law,—one administered in

⁶¹ Williamson v. Lane, 52 Texas, 336; Ex Parte Whitlow, 59 Texas, 273; Gibson v. Templeton, 62 Texas, 556.

courts of law, the other in courts of equity. The organization, jurisdiction, and methods of procedure of these courts are radically different. Although in some instances the same person presides in both courts, he is in legal contemplation a different officer when he hears cases as a judge on the law side of the court, having functions, exercising powers and discharging duties essentially different from those pertaining to him when he sits as chancellor on the equity side. In a common law court, only legal rights can be recognized, and common law penalties or sanctions applied. In a court of equity equitable rights are cognizable and equitable remedies administered. If a party has a legal right against another, he can bring suit in the common law court, and the defendant, though he may have an absolute defense, in equity, is helpless in the common law tribunal. His defense could be neither heard nor determined there. His only remedy is to resort to a court of equity, institute suit on his equitable right, obtain an injunction from the chancellor preventing the plaintiff in the common law from proceeding with the common law action until the suit in equity could be heard, take his decree in equity establishing the superiority of his equitable right, and obtain a perpetual injunction against the plaintiff forbidding him from proceeding further in the common law court. In common law cases a jury is always allowed on the facts and witnesses examined in open court; in equity, no jury can be had—all matters both of law and of fact being decided by the chancellor, and no oral examination of witnesses is allowed before the court, but all testimony is introduced by deposition previously taken. Different systems of pleading obtain in the two tribunals which not only fail to correspond, but are actually conflicting in their fundamental ideas and development.

None of these distinctions have ever obtained in Texas. The civil law knew nothing of them. The Constitution and statutes of Coahuila and Texas and of the Republic ignored them. The Constitution of 1845 and each Constitution since has mentioned them only to deny their existence. As early as 1848⁶² the Supreme Court used this language: "This inquiry is only material here in so far as it conduces to show whether the present defense could be set up either at law or in equity; for if admissible in either jurisdiction, it must be available here. Having no separate court in which equitable rights are exclusively cognizable and having jurisdiction of rights as well equitable as legal, all the rights both equitable and legal appertaining to parties and the subject matter must be adjudicated here in every suit wherein they are litigated and drawn in question."

⁶² Smith v. Doak, 3 Texas, 218.

This doctrine is still more fully announced in a latter case,⁶³ in which the court says:

“Before the introduction of the common law the distinction between law and equity was altogether unknown. The parties stated their causes of complaint and grounds of defense, and on the allegations and proofs such relief was afforded as they were entitled to under any and all laws of the land, without reference to the peculiarities of the English system of jurisprudence which rendered the rights of parties, or at least their relief, dependent not only upon the facts of their case, but also upon the forum in which redress was sought. Upon the introduction of the common law the intention of the Legislature is manifest to prevent such distinction from being recognized; at least to an extent which deprives parties of any relief to which they may be entitled under the rules and principles of either law or equity. By the Constitution of the State and subsequent legislation the distinction between these two systems is in great measure, if not totally, disregarded. The district courts have jurisdiction of all suits, complaints and pleas whatever, without regard to any distinction between law and equity. Jury trials are to be allowed on application of the parties in equity cases. Art. 4, Const. All civil suits are to be commenced by petition, which must contain a clear statement of the cause of action and the relief sought (Acts of 1846, p. 365); and the district judges are authorized, on an appropriate prayer for relief, to grant all such orders or writs or other process as may be necessary to obtain relief; and may also frame the judgment of the court as to afford all the relief which may be required by the nature of the case, and which is granted by courts of law or equity. Acts of 1846, p. 202. The only inquiry then to be made at the institution of a suit is whether the facts of the case are such as to entitle a party to a judgment in his favor in either law or equity; and if he have rights cognizable by either, such relief will be adjudged by the court as the nature of the case demands. The rule that courts of equity will interfere only where the party is remediless at law has but little application under a system in which the litigants in a suit can demand and obtain all the relief which can be granted by either courts of law or equity.”

Still later, a plaintiff sought specific performance of a contract, and in same petition prayed for damages for its breach if its performance could not be enforced. Objection was made that one was an equitable, and the other a legal remedy, and that therefore the alternate prayers could not be entertained. The decision was: “The general rule is that damages must be sought at law and specific performance in equity, but this has no proper application where the jurisdictions are blended and

⁶³ Smith v. Clopton, 4 Texas, 109, decided in 1849.

where therefore both objects may be embraced in the same suit, and where consequently a prayer may be in the alternative, and where if one relief fails the other may be awarded, if on principles of law or equity either the one or the other can be granted."⁶⁴

Where the Matter in Controversy Shall Be Valued at or Amount to Five Hundred Dollars Exclusive of Interest.

With this clause we pass from jurisdictional tests based upon the nature of litigation or the subject matter, and come to one resting entirely upon the amount in controversy in the case.

To determine the effect of this clause, we must consider it in connection with the corresponding clause with reference to the county court, which is in these words:

"The county court shall have exclusive jurisdiction in all civil cases when the matter in controversy shall exceed two hundred dollars and not exceed five hundred dollars exclusive of interest, and concurrent jurisdiction with the district court when the matter in controversy shall exceed five hundred dollars and not exceed one thousand dollars, exclusive of interest."

It is apparent that there is a conflict between these two clauses when the amount is just five hundred dollars. It is held that the clause fixing the jurisdiction of the county court is the more specific expression of the will of the people, and that, therefore, when jurisdiction is dependent wholly upon the amount in controversy and the suit is for exactly five hundred dollars, exclusive of interest and costs, the jurisdiction of the county court is exclusive.⁶⁵ If the suit is for over five hundred dollars and not more than one thousand dollars, the jurisdiction of the two courts, district and county, is concurrent. If the suit is for more than one thousand dollars, the jurisdiction of the district court is exclusive.

Amount in Controversy.

It is important to ascertain what is, in contemplation of law, the amount in controversy. Ordinarily in suits for money demands it is the amount exclusive of interest and cost claimed by appropriate allegations in the plaintiff's petition, as due him from the defendant. In suits for property, it is the value of the property as alleged by the plaintiff. Where the amount thus stated is sufficient to give jurisdiction, this

⁶⁴ Mitchell v. Sheppard, 13 Texas, 490 (1855); Douglas, Brown & Co. v. Neil & Co., 37 Texas, 547; Gibson v. Moore, 26 Texas, 615; Rogers v. Kennard, 54 Texas, 39.

⁶⁵ Railway Co. v. Rainbolt, 67 Texas, 654, 4 S. W., 356 (1881).

jurisdiction is not lost by the defendant's pleading payment or credits, or other offsets; nor will the jurisdiction be lost because the defendant shall establish the truth of his contention and thus reduce the amount of recovery below the jurisdictional amount, or defeat the plaintiff's claim entirely. The controversy is over the matters properly pleaded. The verdict and judgment reached are the results of the controversy. To hold differently would, in many cases, be a practical denial of all remedy. The court could never render a judgment for a defendant who had won a cause, nor for a plaintiff who had secured a verdict for less than the minimum jurisdictional amount of the court in which the case was tried, and no end could be arrived at in such litigation.

This principle was recognized early in our history, and the first civil suit decided by the Supreme Court of the Republic⁶⁶ states the rule very tersely in these words, "the amount of the controversy is the amount claimed in the plaintiff's petition." In the case of *Tarbox & Brown v. Kennon*,⁶⁷ the Supreme Court says: "In questions of jurisdiction thus defined and limited by positive law, it has often been ruled that the plaintiff's demand as set forth in his declaration or petition is to be considered the matter in controversy, and recourse must be had to the demand thus set out to determine the jurisdiction. In such case, the verdict, it is held, is not the rule to determine the amount in controversy, but when the plaintiff declares for a sum within the jurisdiction conferred and there is no plea to the jurisdiction, the court may adjudicate the subject matter, and give judgment for a less sum than that which is required to give jurisdiction."

The Congress of the Republic, by act approved February 5, 1840, embodied this doctrine in a statutory enactment.⁶⁸ It has ever since been recognized and enforced.

Interest.

The amount in controversy must be exclusive of interest and cost.

It becomes important, in view of some recent decisions of our Supreme Court, to ascertain clearly what interest is. The statute⁶⁹ defines it as follows: "Interest is the compensation allowed by law or fixed by the parties to a contract for the use of, forbearance, or detention of money."

Interest is allowed by statute as follows:⁷⁰ "On all written contracts ascertaining the sum payable when no specified rate of interest is agreed

⁶⁶ *Hunter v. Oelrich*, Dall., 358 (January, 1840).

⁶⁷ 3 Texas, 8 (decided December, 1848).

⁶⁸ Laws Fourth Congress, p. 63; *Baker v. Wafford*, 4 Texas, 120; *Watts v. Hardy*, 5 Texas, 387; *Bonner v. Watson*, 6 Texas, 173.

⁶⁹ Rev. Stats. 1895, art. 3097.

⁷⁰ Rev. Stats. 1895, art. 3101.

upon by the parties to the contract, interest shall be allowed at the rate of six per cent per annum from and after the time when the sum is due and payable;" and ⁷¹ "On all open accounts, when no specified rate of interest is agreed upon by the parties, interest shall be allowed at the rate of six per cent per annum from the first day of January after the same are made." Our Supreme Court has held that in the absence of agreement, interest is strictly statutory, and that no compensation allowed by law, or permitted by it to be allowed by the jury in any case for detention of money in the absence of agreement between the parties, is "interest," unless it comes under one or the other of these statutes.

The law of course permits parties to agree for payment of "interest" so long as the contract is not usurious.

For purposes of jurisdiction it is therefore essential to distinguish between "compensation" for the detention of money provided for by the two clauses of the statute above quoted or by lawful agreement between the parties, on the one hand, and "compensation" for such detention permitted by law by way of damages for the loss of the use of the money in cases which do not come under either of the former heads, even though such damages are to be measured by the rate of "interest" fixed by the statute, on the other.

The first is "interest," and is excluded in ascertaining the amount in controversy; the second is not interest and is included.⁷²

The preceding paragraphs give the result of the decisions cited. It is certainly unfortunate that questions of jurisdiction should be embarrassed with technical niceties.

The statutes quoted by the court as a definition of interest appear in our law for the first time in the Revised Statutes of 1879, three years after the adoption of the Constitution of 1876, and thirty years after the Constitution of 1845, in which the term "interest" occurs in connection with the jurisdiction of the district and justices' courts. Further, the Supreme Court of the United States in a number of cases has defined the term so as to include compensation for the detention of money whether fixed by contract, allowed by statute, or permitted under the principles of common law by way of damages.⁷³

It seems some adjustment might be made which would relieve this opportunity for mistake, without doing violence to legal rules of construction. Attorneys' fees provided for in a contract are not interest or costs, and must be taken into account in estimating the amount in

⁷¹ Rev. Stats. 1895, art. 3102.

⁷² Heidenheimer v. Ellis, 67 Texas, 426, 38 S. W., 666; Baker v. Smelser, 88 Texas, 26, 29 S. W., 377; Schultz v. Tessman, 49 S. W., 1031.

⁷³ Brown v. Hiatt, 15 Wall., 185; Insurance Co. v. Piaggio, 16 Wall., 386; Aurora City v. West, 7 Wall., 105; Redfield v. Ystalyfera Iron Co., 110 U. S., 176; Anderson's Law Dict., title "Interest," p. 563.

controversy, unless they be remitted entirely, which the Court of Civil Appeals at Galveston has held may be done.⁷⁴

In *Dwyer v. Bassett*,⁷⁵ a suit brought in the district court for five hundred dollars actual and five hundred exemplary damages, the defendant died pending the suit and the claim for exemplary damages lapsed. The court retained jurisdiction for the five hundred dollars actual damages and damages claimed by way of interest and tried the case. The judgment was affirmed by the Court of Civil Appeals.

Joinder in Causes of Action to Make Jurisdictional Amount.

Other interesting questions arise in cases in which a number of claims are joined and made the basis of a suit, no one of them alone being sufficient to give jurisdiction. The decisions agree that when all the claims are due and unpaid and suable in the county in which the suit is brought, the jurisdiction attaches and is unaffected by the fact that no one of the claims is alone sufficient in amount. The question was first considered and the contrast in this regard between the Texas and the common law systems made in *Myers v. Lewis*.⁷⁶ The opinion is as follows:

"The next error assigned is that the court has no jurisdiction in the case. The assignment is founded on the fact that one of the notes set out in the plaintiff's petition is for a sum under the jurisdiction of the district court, and cognizable before a justice of the peace. It is a rule applicable to a declaration, according to the English practice, that where different notes or acknowledgements are sued on, each one must be separately counted, and that each count must show of itself a sufficient cause of action; but even a strict compliance with that system could not oust the jurisdiction in this case, because two of the counts would be good, as two of the notes are for an amount sufficient to give jurisdiction, and the objection would be confined to one count only; and if that was bad, it would not vitiate the two good counts. This would have been the result of a strict application of the rules of practice to a common law declaration; but it is believed that a less stringent rule would now prevail even under that system. If the larger note would give the court jurisdiction, it would then attach to the smaller one. It is needless, however, further to discuss the effect of the common law rules of practice; we have a different system. Counts in pleading, technically speaking, are entirely unknown to our practice. The plaintiff sets out in his petition his grounds of action, distinctly alleging the facts on which his right to recover is based. If founded on contracts or

⁷⁴ *Burke v. Adams*, 3 Texas Civ. App., 496.

⁷⁵ 29 S. W., 815.

⁷⁶ 4 Texas, 38 (decided in 1849).

promises in writing, he is required so to describe them as to advise the defendant of the grounds on which he relies. But I apprehend that the amount of the defendant's indebtedness to him at the time suit is brought must form the criterion for determining the jurisdiction of the court; and if the aggregate of the indebtedness, being by distinct promises of different amounts, within the jurisdiction of the court, it is sufficient. I am fully aware that, in those courts governed by common law rules of practice, it has been held otherwise; and that a party will not be permitted to unite two distinct promissory notes, neither of them alone of sufficient amount to give jurisdiction to the court. I apprehend, however, that this arises from the form of their declaration, and that each separate count must show a right of action. I can see no reason why, under our practice, it should not be allowed. These different notes would be only evidence showing the amount of indebtedness; and the costs and inconvenience to parties would in all probability be not so great attending one suit in a higher tribunal as they would be if several suits were brought, one on each promise, in an inferior jurisdiction."

The authority of this and similar cases has never been questioned.

In *Middlebrook v. Brown, Bradley & Co.*, the company brought suit in the district court against *Middlebrook et al.* on three notes, one originally for over five hundred dollars, but upon which there was a credit reducing it to three hundred and forty dollars. Each of the other notes was for a less sum. The larger and one of the smaller notes were payable in the county in which the suit was brought, the other was not. The defendants lived in another county. They plead their privilege to be sued on the last mentioned note in the county of their residence, and to the jurisdiction of the court as to the other two notes, since they did not aggregate five hundred dollars after deducting the credit. The district court sustained the plea of privilege as to the note not made payable in the county and overruled the plea to the jurisdiction with reference to the remaining notes, and gave judgment against the defendants for the amounts due on them. On appeal, the Court of Civil Appeals held that the court was right in sustaining the plea of privilege, but that striking out the note not payable in that county destroyed the jurisdiction of the court as to the others, reversed the judgment and entered an order dismissing the case. On writ of error, the Supreme Court held that the Court of Civil Appeals erred in both particulars, saying: "We are of opinion that the district court did not err in refusing to dismiss the cause on the plea to the jurisdiction, but that it did err in sustaining defendants' plea of privilege to be sued in the county of their residence on the note for one hundred and sixty dollars. The two notes being payable in the county where the action was brought, suit was properly brought there, and in order to avoid multi-

plicity of suits it was proper to embrace in the same action the other notes. *Clegg v. Varnell*, 18 Texas, 304; *Chevalier v. Rusk*, Dallam Digest, 613.⁷⁷

It has been several times held that where a suit has been brought on an open account and some of the items appear on the face of the plaintiff's petition to be barred and the balance of the items are not sufficient to give jurisdiction, if the defendant objects to the jurisdiction by special demurrer setting up limitation, the jurisdiction is lost.⁷⁸

There is no misunderstanding as to the doctrine of the two opinions just cited. Each clearly announces the rule as given in the text. It seems quite plain that they are out of harmony with the great weight of authority on analogous questions. If the amount in controversy be, as the authorities teach, the amount claimed by the plaintiff in his petition in good faith, and in such form as to legally entitle him to judgment by default, upon the failure of the defendant to answer, then these decisions are justly subject to criticism.

Limitation can only be availed of under our statute by special plea, either in the form of a special exception or as an answer to the merits stating the facts. In the cases under consideration, the petitions were good and would have sustained a judgment by default, and were good even against a general demurrer. If the answer in either case had consisted of a general demurrer and general denial and the proof had sustained the plaintiff's allegations, he would have been entitled to recover the full amount. So we have in each case pleadings legally tendering issues for an amount within the jurisdiction of the court, and in each it not only might, but *was required to*, render judgment for plaintiff in the absence of special plea of limitation; yet, when the defendant controverts a portion of these causes of action by such a special plea, he eliminates from the amount in controversy all of the items as to which this special plea is good, and thereby ousts the jurisdiction of the court. This seems to be a point upon which precedent and principle do not agree.

The latest decision on this subject is from the Court of Civil Appeals of the Fifth District,⁷⁹ and announces just the opposite doctrine from that stated in the two opinions just discussed. There is no reference to either of these cases either in the brief of counsel or in the opinion of the court. A writ of error was applied for to the Supreme Court, but was dismissed for want of jurisdiction. It is to be hoped that the doctrine of this later case from the Court of Civil Appeals will prevail.

In *Bonner v. Watson*,⁸⁰ it was held that where suit is brought on two

⁷⁷ *Middlebrook v. Bradley*, 86 Texas, 706, 26 S. W., 935.

⁷⁸ *Low v. Bawbarnd*, 26 Texas, 507; *Keller v. Huffman*, 26 S. W., 863.

⁷⁹ *Kelley v. Western Union Tel. Co.*, 43 S. W., 532.

⁸⁰ 6 Texas, 173 (1851).

claims, one of which is within the jurisdiction of the court and the other is not, if it is shown on trial that the former was paid before the suit, this defeats the jurisdiction. I have found no case expressly overruling, criticising, or even limiting this decision. It seems to be contrary, however, to the principles applied in the numerous authorities cited hereafter, which require that issues of this sort must be raised by plea in abatement alleging fraud. There is, however, one subsequent case,⁸¹ which cites this case with approval.

This question is presented in another form in cases where the real cause of action is more than the jurisdictional amount of the court in which the plaintiff desires to bring suit. Can the plaintiff in such a case voluntarily remit a portion of his claim and thus give jurisdiction? The effort is sometimes made by entering a fictitious credit before suit and sometimes by entering a remitter or by amending the pleadings and expressly abandoning a part of the action after suit has been filed. The question appears to have been decided both ways. The latest and most interesting decision is in the case of *Burke v. Adoue*,⁸² where suit was brought in the county court on a note, the principle of which, exclusive of the 20 per cent attorneys' fees, as stipulated in the note, was less than one thousand dollars, but including the attorneys' fees exceeded that sum. The original petition was for the whole amount, which exceeded the jurisdiction. The point was raised by exception and the plaintiff took leave to amend, and in the amended petition sought to recover all the face value of the note and enough attorneys' fees to make just one thousand dollars. The lower court permitted this to be done and rendered judgment accordingly. On appeal, the case was reversed and dismissed, the Court of Civil Appeals holding that the claim for attorneys' fees was entire and could not be divided, and that, therefore, jurisdiction could not be given to the county court by abandoning a portion of the attorneys' fees. On rehearing, the decision was modified, the judgment reversed, and the cause remanded, with instructions to the county court to dismiss the suit, unless the plaintiff remitted all the attorneys' fees.

Another phase of this question is presented and decided in *Western Union Telegraph Company v. Durham*.⁸³ This was a suit in a justice's court for unliquidated damages, the amount being stated at \$98.50. Before bringing suit the plaintiff had presented a claim for damages in the sum of \$112.50. The defendant claimed that the plaintiff had fraudulently lessened his claim so as to cut off its appeal from the county court to the Court of Civil Appeals, and thus terminate the liti-

⁸¹ *Goodwin v. Dean*, 49 Texas, 248.

⁸² 3 Texas Civ. App., 496.

⁸³ 42 S. W., 792.

gation in the county court. The court distinguished the case from suits for liquidated demands when the real cause of action is beyond the jurisdictional amount and the plaintiff gives fictitious credit to bring the amount sued for within the court's jurisdiction, as in *Burke v. Adoue*, 3 Texas Civil Appeals, 496, and held that the plaintiff could allege the amount of his damages at a smaller sum and the defendant could not object.

Ordinarily in suits for foreclosure of liens on personal property the amount in controversy is held to be the value of the property and not the amount of the debt, and the jurisdiction is consequently fixed by that value. The question was thus decided at an early date and it has been since continuously so held.⁸⁴

The principle does not apply when the lien is a general one under a statute as a landlord's lien on the property of the tenant on the rented premises. In such cases the amount of the debt fixes the jurisdiction.⁸⁵

Still another form of the question presents itself in cases in which a party is sued in the county or justice's court on an amount within the jurisdiction of the court, and the defendant desires to plead in set-off or cross-action a claim or demand above the jurisdictional amount. It seems to be settled that this can not be done. If, however, the claim of the plaintiff is so closely connected with the defendant's demand that, in fact and in law, the plaintiff's claim has been applied as a credit on that of the defendant, extinguishing the former and reducing the latter *pro tanto*, these facts may be shown as in the nature of a payment to defeat the plaintiff's recovery.⁸⁶

It sometimes occurs that a plaintiff brings suit in the district or county court for a sum below the jurisdictional amount and the defendant pleads in reconvencion a debt or claim within the jurisdiction. Here the court has no jurisdiction until the cross-action is filed, but when that comes in, it, for jurisdictional purposes, is treated as the commencement of the suit, and the plaintiff's claim as an offset or credit on the defendant's demand, as the facts may require.⁸⁷

In *Smith v. Wilson*,⁸⁸ the Court of Civil Appeals held that, if the court has jurisdiction to issue an injunction and does so, the defendant may in reconvencion sue for the amount of the judgment sought to be enjoined, even though such amount is below the jurisdictional amount of the court.

⁸⁴ *Marshall v. Taylor*, 7 Texas, 235; *Lowe v. Howard*, 22 Texas, 7; *Hargrave v. Simpson*, 25 Texas, 396; *Smith v. Giles*, 65 Texas, 341; *Cotula v. Goggan*, 77 Texas, 32, 13 S. W., 742; *Lake Co. v. Austin Electric Co.*, 30 S. W., 832.

⁸⁵ *Dazey v. Pennington*, 10 Texas Civ. App., 326, 31 S. W., 312.

⁸⁶ *Dalby v. Murphy*, 25 Texas, 354; *Gimble v. Gomprecht*, 89 Texas, 497, 35 S. W., 470.

⁸⁷ *Phelps & Bigelow Windmill Co. v. Parker*, 30 S. W., 365.

⁸⁸ 44 S. W., 556.

The plaintiff sometimes intentionally states his damage at an amount greater than that actually sustained, in order to give a show of jurisdiction. Whenever a defendant conceives this to be the case, he must, if he wishes to avail himself of the point, file a plea in abatement under oath raising this issue and have this plea determined. If the jury, or the judge, if no jury is demanded, finds that the plaintiff has been guilty of such misconduct, the case will be dismissed. There is a very interesting discussion of the subject and of the cases bearing upon it in a recent decision by the Supreme Court.⁸⁹ The result may be summarized as follows:

1. The amount claimed in the pleadings and not the amount recovered is the criterion by which jurisdiction is to be determined.

2. The defendant may, without affecting the jurisdiction of the court, reduce the amount claimed by the plaintiff by any legitimate pleading and proof at his command.

3. When the jurisdictional averments are known by the plaintiff to be untrue and are made for the purpose of deceiving the court, and thus procuring a hearing on his cause in a court which would not have jurisdiction if he had truly set out his cause of action, such conduct is fraudulent, and if properly brought to the attention of the court, will defeat the jurisdiction.

4. This suggestion of fraud can only be made by plea in abatement sworn to and filed in due order, that is, before answer to the merits.⁹⁰

Contested Elections.

The clause conferring this jurisdiction is an innovation in Texas constitutional law. Nothing similar to it appears in any of our Constitutions prior to the amendments of 1891. Many statutes had been passed attempting to confer such jurisdiction upon the courts, but no one of them had ever been sustained. The objections were fundamental, as the district court was a tribunal created by the Constitution with enumerated powers, having no jurisdiction except over suits, complaints and pleas of a judicial nature, and contests over elections not being of

⁸⁹ Hoffman v. Building and Loan Assn., 85 Texas, 409, 22 S. W., 154.

⁹⁰ Sherwood v. Douthit, 6 Texas, 224; Budd v. Ballew, 11 Texas, 269; Graham v. Roeder, 5 Texas, 145; Dyer v. Batsell, 63 Texas, 276; Railway Co. v. Nicholson, 61 Texas, 552; Roper Bros. v. Brady, 80 Texas, 588, 16 S. W., 434; Sulphen v. Norris, 44 Texas, 209; McDaniel & Co. v. Cherry, 64 Texas, 179; Tidball v. Eichoff, 66 Texas, 58, 17 S. W., 263; Ratigan v. Holloway, 69 Texas, 469, 6 S. W., 785; Myers v. Jones, 4 Texas Civ. App., 330, 23 S. W., 562; Baker v. Terrell & Guinn, 4 Texas Civ. App., 539, 23 S. W., 604; Railway Co. v. Wilm et al., 9 Texas Civ. App., 161, 28 S. W., 925; Lawson v. Lynch, 9 Texas Civ. App., 582, 29 S. W., 1128; Massie & Rather v. Bank, 11 Texas Civ. App., 270.

this class, the Legislature was without power to confer authority upon that court to hear them.

Beginning with the case of *Bradley v. McCrable*,⁹¹ and continuing until the adoption of the amendments of 1891, there is an unbroken line of decisions denying the existence of such power in the courts under the constitutional grant of authority and also the power of the Legislature to confer it.⁹²

It is held that this clause of the Constitution is not self-executing, nor did it vitalize the previous act of the Legislature on the subject, which had been inoperative for lack of constitutional authority.⁹³

In 1895, the Legislature passed an act prescribing the manner of proceeding in such cases and the jurisdiction is now recognized and exercised.⁹⁴

It is held that the jurisdiction of the district court is exclusive and not dependent on the amount in controversy.⁹⁵

Said Courts and Judges Thereof Shall Have Power to Issue Writs of Habeas Corpus, Mandamus, Injunction, and Certiorari, and All Writs Necessary to Enforce Their Jurisdiction.

The corresponding clause in the Constitution of 1876 was identical with the above, except that the words "in felony cases" occurred after the words *habeas corpus*.

The present county court clause is in these words: "The county court and the judge thereof shall have power to issue writs of injunction, *mandamus*, and all writs necessary to the enforcement of the jurisdiction of said court, and to issue writs of *habeas corpus* in cases in which the offense charged is within the jurisdiction of the county court or any other court or tribunal inferior to said court."

This clause in the Constitution of 1876 was in the same words, except that the word "other" was inserted between the words "all" and "writs," so that it read, "all other writs necessary to the enforcement," etc.

The judges of the courts are also named in these grants of power, but it must always be kept in mind, that no judge, merely as such, can

⁹¹ Dallam, 504.

⁹² *Wright v. Fawcett*, 42 Texas, 204; *Ex Parte Towles*, 48 Texas, 413, and cases cited; *Gibson v. Templeton*, 62 Texas, 555.

⁹³ *Odell v. Wharton*, 87 Texas, 173, 27 S. W., 123.

⁹⁴ Acts 1895, p. 58; *Batts' Stats.*, art. 1793, et seq.; *Dean v. State*, 88 Texas, 291, 30 S. W., 1047; *State v. Thompson*, 88 Texas, 229, 30 S. W., 1046.

⁹⁵ *Dean v. State*, *supra*.

render any final judgment or decision in any cause. The writs issued by such an officer are interlocutory or preliminary in their nature and the authority to render final decisions in the causes in which writs are issued rests exclusively in the courts.

Habeas Corpus.

This writ is not ordinarily a civil remedy, and hence no general discussion of it is required here. It has, however, been held by the Court of Criminal Appeals and by our Supreme Court that a proceeding by *habeas corpus* on the part of a parent to obtain possession of a child, or by a guardian of his ward, is a civil action and the district court and their judges have jurisdiction over them, and that jurisdiction in such cases may be entertained by the Courts of Civil Appeals and by the Supreme Court.⁹⁶

Mandamus and Injunction.

Mandamus is a common law, not an equitable writ.⁹⁷ There is in this State no constitutional or statutory definition of this writ; nor have I found one in any Texas decision that is full or satisfactory. At common law it was defined as follows: "A writ (formerly a high prerogative writ) which issues from a court of superior jurisdiction and is directed to a private or municipal corporation or to any of its officers or to an executive, administrative, or judicial officer, or to an inferior court commanding the performance of the particular thing therein specified and belonging to his or their public, official, or ministerial duty, or to directing the restoration of the complainant to rights or privileges of which he has been illegally deprived."⁹⁸ Mr. Fishback⁹⁹ defines it thus: "The writ of *mandamus* is a command issuing from a court of competent jurisdiction in the name of the State directed to some corporation or officer, or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law."

Injunction is strictly an equitable writ and is never issued by courts of common law jurisdiction. Mr. High, in his work on Injunctions, says: "A writ of injunction may be defined as a judicial process operating *in personam*, and requiring the person to whom it is directed to do or

⁹⁶ *Ex Parte Reed*, 28 S. W., 689; *Ex Parte Berry*, 28 S. W., 806; *Legate v. Legate*, 87 Texas, 248, 28 S. W., 281.

⁹⁷ *Merrill on Mandamus*, p. 2; *Tax Collector v. Finley*, 88 Texas, 522, 32 S. W., 524.

⁹⁸ *Black's Law Dict.*, title "Mandamus."

⁹⁹ *Manual of Elementary Law*, sec. 585.

to refrain from doing a particular thing. In its broadest sense the process is restorative as well as preventive, and it may be issued both in the enforcement of rights and in the prevention of wrongs. In general, however, it is used to prevent future injury rather than to afford redress for wrongs already committed, and it is therefore to be regarded more as a preventive than as a remedial process. If the injury be already committed, the writ can have no operation to correct it, and equity will not interfere for purposes of punishment, or to compel persons to do right, but only to prevent them from doing wrong. Nor will a court of equity lend its aid by injunction for the enforcement of right or the prevention of wrong in the abstract, and unconnected with any injury or damage to the person seeking the relief.

“Injunctions are known as mandatory or preventive, according as they command defendant to do or to refrain from doing a particular thing. While the jurisdiction of equity by way of mandatory injunction is rarely exercised, and while its existence has even been questioned, it is nevertheless too firmly established to admit of doubt. Mandatory injunctions are seldom allowed before a final hearing, though they may be granted on interlocutory applications.”

The construction placed upon these clauses in the Constitution of 1876 was that the district court had general jurisdiction to issue writs of *mandamus* and injunction,—that is, that those courts could be resorted to and could give relief in any and all cases in which either of said writs was a proper remedy without reference to the amount in controversy or to whether the matter were capable of pecuniary valuation; but that the county court could only issue such writs when they became necessary in the progress of some litigation already begun and pending in such court, and then only for the purpose and to the extent of enabling the court to exercise its authority over matters legitimately before it. This difference in the powers of the two courts was based largely on the use of the word “other” in the county court clause, and its absence in the district court clause.¹⁰⁰ The change in the present Constitution by the omission of the word other from the county court clause does not seem to have been called to the attention of the higher courts for some time after the amendments of 1891 went into effect, and several of the earlier cases decided under those amendments take no notice of the change.

The first *mandamus* case under the present Constitution expressly states that the amount in controversy does not effect the question of

¹⁰⁰ County of Anderson v. Kennedy, 58 Texas, 616; Hale v. McComas, 59 Texas, 487; Railway Co. v. McDaniels, 62 Texas, 74; Day v. Chambers, 62 Texas, 191; Chambers v. Cannon, 62 Texas, 294; Caruthers v. Harnett, 67 Texas, 129, 2 S. W., 523; Railway Co. v. Ware, 74 Texas, 49, 11 S. W., 918.

jurisdiction in *mandamus* cases.¹⁰¹ This can hardly be considered as authoritative, because at that time, as disclosed by the record, the County Court of Shelby County, in the district court of which the case was tried, had no civil jurisdiction. The Legislature had transferred such jurisdiction to the district court, so that in this particular county the district court would have been authorized to issue the writ, even though power to do so did not ordinarily lie in the district court.

The case of *Kimberly v. Morris*,¹⁰² was brought in the district court to compel by *mandamus* the commissioners court to order a local option election. There was no ascertainable pecuniary interest in the petitioners, nevertheless the jurisdiction of the district court was sustained.

The Supreme Court first mentions the change in the Constitution, in *Dean v. State*,¹⁰³ saying: "The omission from the amendment of the word 'other' had escaped our attention until called to our attention by the argument in support of this motion. It results from the previous decisions of this court that the omission of this word materially changes the meaning of the provision and enlarges the power of the county court to issue writs of *mandamus* and injunction. *Anderson Co. v. Kennedy*, 58 Texas, 616; *Carlyle v. Coffee*, 59 Texas, 391."

Johnson v. Hanscom,¹⁰⁴ decided by the Supreme Court, November 12, 1896, was an action in the district court for *mandamus* to compel the delivery of a warrant in the favor of the plaintiff upon the county treasurer for the sum of \$203.40. Here there was a specific, ascertainable money value of the matter in controversy. The Supreme Court says: "Under the amended section 16 of article 5 of the Constitution, this proceeding might properly have been instituted in the county court. Before the amendment, the district court alone had power to issue the writ of *mandamus* except when it was necessary to enforce the jurisdiction of some other court, but we are of opinion that by virtue of the amendment the county court has power to issue the writ in any case where a mere moneyed demand is involved and the amount of that demand exceeds two hundred dollars and does not exceed one thousand dollars, exclusive of interest. Our reasons for the conclusion are given in the opinion on the motion for rehearing in the case of *Dean v. State*. 88 Texas, 296." Clearly this case proceeds on the idea that in cases of *mandamus* when the amount is more than two hundred and not more than one thousand the jurisdictions of the district and county courts are concurrent.

The Courts of Civil Appeals have rendered several interesting decis-

¹⁰¹ *Lucky v. Short*, 1 Texas Civ. App., 6, 20 S. W., 723, decided October 12, 1892.

¹⁰² 87 Texas, 637, 31 S. W., 808.

¹⁰³ 88 Texas, 296, 31 S. W., 185, decided May 30, 1898.

¹⁰⁴ 90 Texas, 321, 37 S. W., 601.

ions on this subject. In *Morrison v. Carnahan*,¹⁰⁵ the court in the Fourth District decided that the district court can issue an injunction to restrain sale of exempt property, levied on in the justice court, irrespective of its value, citing *Stein v. Kleberg*, 64 Texas, 271, decided under the Constitution of 1876. In *Gulf, Colorado & Santa Fe Railway Company v. Blankinbeckler*,¹⁰⁶ the Court of Civil Appeals in the Second District uses this language: "Section 8, article 5 of the Constitution of Texas as amended September 22, 1891, fixes and prescribes the jurisdiction of the district courts, specifying the various matters over which they are given jurisdiction. In one clause power to issue the writ of injunction is expressly conferred without specifying any limitation as to the amount involved in the suit or subject matter. This clause of this section of the Constitution so far as it applies to injunction is substantially the same as contained in the same section and article of 1876, which in *Anderson v. Kennedy*, 58 Texas, 621, was construed by our Supreme Court to confer jurisdiction upon the district court to grant the writ enjoining the county of Anderson and its officers from levying and collecting a tax of less than one hundred dollars. And the Supreme Court in that case puts the jurisdiction on the ground that the power to issue the writ is general and not confined to cases where jurisdiction has been given over the subject matter or fixed by the amount in controversy (citing numerous authorities). It may be that the county court under a similar clause in section 16 of article 5 has also jurisdiction to grant this writ, *Brown v. Young*, 2 Posey Unrep. Cases, 335; *Dean v. State*, 88 Texas, 290; Rev. Stats., 1895, article 2989. This, however, we do not mean to decide. We are of opinion that if it did the jurisdiction would be concurrent, and that the inserting of said clause in section 16 did not in any manner deprive the district court of its power in such cases. We are therefore of opinion that appellee's cross assignment of errors are not well taken, and the district court had jurisdiction to issue the writ and try the cause."

This was a suit to enjoin a judgment of the justice court for sixteen dollars, which was claimed to be void.

One of the most interesting decisions on this subject is from the same court of date February 13, 1897, in the case of *Lazarus v. Swafford*,¹⁰⁷ The opinion is as follows:

"This suit which was brought in the District Court of Collingsworth County to enjoin the tax collector from selling twenty-seven head of appellant's cattle under an alleged assessment of taxes, amounting to \$350, was dismissed for want of jurisdiction, and the preliminary injunction consequently dissolved; hence this appeal. If the precise question

¹⁰⁵ 31 S. W., 436, May 29, 1895.

¹⁰⁶ 13 Texas Civ. App., 249, 33 S. W., 331, April 4, 1896.

¹⁰⁷ 15 Texas Civ. App., 367, 39 S. W., 389.

thus raised had been authoritatively decided, we are not aware of it. Before the adoption of the amendment to article 5 of the Constitution, which has remodeled that entire article, it was decided that the district courts, under the express power given in the Constitution to issue injunctions and other writs named, had jurisdiction in cases in which a court of chancery would have taken jurisdiction in order to afford relief by injunction, without reference to the amount in controversy. *Anderson Co. v. Kennedy*, 58 Texas, 616. This conclusion was stated in the opinion of Justice Stayton to have resulted from 'the consideration of the several provisions of the Constitution,' of which the bill of rights, declaring in substance that every person, for an injury done him in property, person, or reputation, should have a remedy, was adverted to; and also section 16 of article 5, limiting the power of county courts to issue writs of injunction, *mandamus*, etc., to cases where it was necessary to the enforcement of their jurisdiction. An apparent omission of the Constitution seems thus to have been, in effect, supplied by judicial construction, and the very necessity of the case doubtless had its effect in the production of this result; but the amendment of the judiciary article, probably owing to the fact that difficulties were encountered in the case cited, with others of its class, has removed these difficulties, and made plain the purpose of said article in its distribution of jurisdiction among the several courts of Texas. This amendment, according to recent decisions of our Supreme Court, has introduced with the changes made a change of construction. *Dean v. State*, 88 Texas, 290, 30 S. W., 1047, and 31 S. W., 185; *Johnson v. Hanscomb* (Texas Sup.), 37 S. W., 601. In order to avoid any possible misconstruction of the following explicit language of section 16, article 5, defining the jurisdiction of the county courts,—‘And they shall have exclusive jurisdiction in all cases when the matter in controversy shall exceed in value \$200 and not exceed \$500, exclusive of interest,’—the amendment thereof entirely removes the restriction which previous decisions had construed as depriving county courts of the power to issue injunction, *mandamus*, etc., when not necessary to the enforcement of their jurisdiction. In the case last cited it was held that the amount in controversy should be looked to in determining whether the county court, since the amendment, has jurisdiction in a *mandamus* case. It would seem to follow from this holding that the language of the Constitution above quoted, where the amount is between \$200 and \$500, as in this case, excludes the jurisdiction of any other than the county court in both *mandamus* and injunction cases. It certainly could not have been the intention of the framers of the amendment to make the jurisdiction of the county and district courts concurrent in such cases. That would be inconsistent with the whole tenor of the judiciary article, and particularly of section 16, which defines so accurately the extent both of the exclusive and concurrent jurisdiction of the county court. And, in order to avoid a recurrence of any such difficulties as confronted the court when the *Anderson County* case was decided, and to put this matter forever at rest, the amendment further provides, in defining the jurisdiction of the district court, that

it shall have 'general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution.' Our conclusion, therefore, is that, as the amount in controversy is now made the test of the county court's jurisdiction in all cases alike, where that amount exceeds \$200 and does not exceed \$500, the jurisdiction of the county court is exclusive, notwithstanding the general power conferred in section 8 upon district courts to issue writs of injunction and *mandamus*. The general provision should be read in the light of the changes before considered, clearly indicating an intention to confer upon county courts as a part of their jurisdiction the power to issue writs of injunction in cases where courts of chancery, under the settled principles of equity, would issue them, but limiting such power to cases in which jurisdiction depends upon the amount in controversy, and making that jurisdiction exclusive or concurrent, according to the amount. This conclusion is strengthened by the decisions in *Erwin v. Blanks*, 60 Texas, 583, and *Railway Co. v. Rainbolt*, 67 Texas, 654, 4 Southwestern Reporter, 356, holding that the general provisions of section 8 should yield to the more specific ones of section 16. As amended, section 16 confers upon the county courts, as courts both of law and equity, within the prescribed limits, all the power conferred upon the district courts, within their sphere of action, and within the amounts above specified expressly excludes the jurisdiction of all other courts. Judgment affirmed."

Smith v. Kitchens,¹⁰⁸ reiterates the doctrine that the district court has jurisdiction to enjoin the sale of property levied on by execution issued from a justice's court.

In *Jackson v. Finley*,^{108a} a suit brought in the county court to enjoin a sale under execution from the district court, on a judgment for six hundred and ninety dollars, and to compel the plaintiff in execution to allow a credit on the judgment of one hundred and ninety-seven dollars, it was held that the jurisdiction to compel the credit and perpetually enjoin execution for that sum existed in county court. It must be observed that the sale enjoined was under an execution for an amount within the county court's jurisdiction, and its jurisdiction having attached in the case under its equity powers, it could make such final disposition of the motion as the law and facts demanded.

*Jennings v. Shiner*¹⁰⁹ again announces the doctrine of the district court's jurisdiction to enjoin judgments of justices' courts. There are some expressions as to when such jurisdiction may properly be exercised which may not prove to be in harmony with the law, but as to the existence of the power in the district court, the opinion is well supported.

¹⁰⁸ 40 S. W., 42, Court of Civil Appeals, second District, March 20, 1897.

^{108a} 40 S. W., 427, Court of Civil Appeals, Third District, March 31, 1897.

¹⁰⁹ 43 S. W., 276, Court of Civil Appeals, November 17, 1897.

In *Irvin v. Edwards*,¹¹⁰ the Supreme Court affirmed the judgment of the District Court of LaSalle County, enjoining the collection of one hundred and forty-seven dollars as tax on personal property. No point was made as to the jurisdiction of the district court in the trial of the case, but on motion for rehearing in the Supreme Court it was insisted that, as the present constitutional provisions regarding district and county courts were the same, and both were similar to the district court clause in the Constitution of 1876, the writ might have been issued by the county court, and therefore the Supreme Court was without jurisdiction to issue the writ of error or hear the case. The motion was overruled and the injunction made perpetual. No written opinion was filed on the motion. This action seems to indicate that the Supreme Court regards the jurisdiction of the district court to issue injunctions when the amount is less than two hundred dollars as exclusive, though it is possible that the case was dealt with as involving a question of "revenue law" and for that reason the action of the Court of Civil Appeals was not final.

In *Winstead v. Evans*,¹¹¹ it is held by the Court of Civil Appeals that, as the county court now has appellate jurisdiction and supervisory control over justices' courts, the jurisdiction of the county court to compel by *mandamus* the entry of final judgment by a justice of the peace, in a case appealed from his court to the county court, is exclusive. Under such circumstances the district court is without authority to issue the writ.

Revised Statutes, article 4861, prohibits the issuance by the district courts of the writ of *mandamus* against the head of any department of the government. The power to issue such writs against all State officers, except the Governor, and against district judges is now conferred upon the Supreme Court as original jurisdiction.

The following seems to be the result of the Constitution and statutes as construed by the court:

Neither the district nor county courts can issue writs of *mandamus* against the Governor or head of any department of the State government. If the matter in controversy has no ascertainable money value, then writs of *mandamus* concerning it may be issued by the district court¹¹² The same seems to be true if the value is doubtful in amount and no allegation of value is made.¹¹³ Doubtless the same is true of injunction.

Whether such jurisdiction is exclusive has not been expressly decided, but evidently this is the case.

In cases of moneyed value and where the writ is not desired in aid of

¹¹⁰ 92 Texas, 258, 47 S. W., 719.

¹¹¹ 33 S. W., 580.

¹¹² *Kimberly v. Morris*, 87 Texas, 637, 31 S. W., 808.

¹¹³ *Jackson v. Swayne*, 92 Texas, 242, 47 S. W., 711; *Town of Pearsall v. Wools*, 50 S. W., 959.

a jurisdiction already being exercised by the county court, the district court has jurisdiction, if the amount is over one thousand dollars, or is two hundred dollars, or less.¹¹⁴ The jurisdiction in such cases is apparently exclusive.

In cases of moneyed value and when the writ is not in aid of existing jurisdiction, the jurisdiction of the two classes of courts is concurrent when the amount is over five hundred and not over one thousand dollars.¹¹⁵ If the amount is over two hundred and not over five hundred dollars, the Supreme Court refuses to grant writs of error in cases originating in the district court, thus indicating that it regards the jurisdiction as concurrent in the district and county courts,¹¹⁶ though it has not expressly decided the question.

The Court of Civil Appeals at Galveston has held that the district court has jurisdiction in these cases, but has not passed on the county court's jurisdiction.¹¹⁷

The Court of Civil Appeals at Fort Worth has held that, in such cases, the jurisdiction of the county court is exclusive.¹¹⁸

These seem to be the rules as to ordinary cases of *mandamus* or injunction, but different considerations control when the purpose of the suit is to prevent or cure the abuse of legal process issued in a case pending or based on a judgment or decree already rendered. In such cases, the process—injunction, *mandamus*, or other writ—by which the abuse of the prior process is sought to be prevented or controlled must emanate from the court originally exercising jurisdiction in the case, and from which the abused process issued, unless by its nature such court is entirely without power to render efficient relief.¹¹⁹

As both district and county courts are fully capable of controlling their own process, whenever the writ issues from one of them the control must be exercised not alone by a court of the class from which the abused process issued, but by the very court issuing it.¹²⁰

It must be borne in mind that this is not a question of concurrent or exclusive jurisdiction between two or more classes of courts, but of the lawful right and capacity of any given court of any class to control its own process and rectify any mistake or abuses occurring thereunder.

If the process which is being abused issues from the justice's court, that court is without power in many instances to correct the wrong,

¹¹⁴ *Morrison v. Carnahan*, 31 S. W., 436; *G. C. & S. F. Ry. Co. v. Blankenbeckler*, 13 Texas Civ. App., 249, 33 S. W., 331; *Smith v. Kitchens*, 40 S. W., 42; *Jennings v. Shiner*, 43 S. W., 276; *Irvin v. Edwards*, 92 Texas, 258, 47 S. W., 719.

¹¹⁵ *Johnson v. Hanscom*, 90 Texas, 321, 37 S. W., 601; *Dean v. State*, 88 Texas, 296, 31 S. W., 185; *Lazarus v. Swafford*, 15 Texas Civ. App., 367, 39 S. W., 389.

¹¹⁶ *Johnson v. Hanscom*, *supra*.

¹¹⁷ *Johnson v. Hanscom*, 37 S. W., 453.

¹¹⁸ *Lazarus v. Swafford*, *supra*.

¹¹⁹ *Miller v. Koertge*, 70 Texas, 167, 7 S. W., 691.

¹²⁰ *Jackson v. Finley*, 40 S. W., 427; *Lincoln v. Anderson*, 51 S. W., 278.

and if the amount is two hundred dollars or less, the power to do so is in the district courts; if it is over two hundred and not over one thousand dollars, the district court still has power to correct, though the exclusiveness of this latter power is more doubtful.¹²¹

Writs of *mandamus* to control the ministerial action of a justice of the peace as to a case pending before him must, however, be issued by the county court of the proper county.¹²²

Certiorari.

This writ is issuable either by court of common law or equity. Black's Dictionary defines it as follows: "*Certiorari*: (To be informed of; to make certain in regard to.) The name of a writ issued by a superior court directing an inferior court to send up to the former some pending proceeding, or all the record and proceedings in a cause before verdict, with its certificate of the correctness and completeness of the record for review or trial, or it may serve to bring up the record of a case already terminated below, if the inferior court is one not of record, or in cases where the procedure is not according to the course of the common law. Originally and in English practice a *certiorari* is an original writ issuing out of the court of chancery or the king's bench and directed in the king's name to the judges or officers of inferior courts commanding them to certify or return the records or proceedings in a cause depending before them for the purpose of a judicial review of their action."

The principal office of this writ in the district court is to remove to that court proceedings in administration or guardianship, or similar matters, from the county court, and in the county court is to remove into it cases tried in the justice's court. It is the writ by which each of these courts exercises its supervisory control over the inferior courts subject thereto in all cases beside those in which appeals are taken. The issuance of the writ and proceedings thereunder are regulated by statute, by the district court by title 15, chapter 1, and by the county court, by title 15, chapter 2, Revised Statutes of 1895. A number of the most important cases with reference to this writ are given below.¹²³

¹²¹ Gibson v. Moore, 22 Texas, 615; Miller v. Koertge, 70 Texas, 167, 7 S. W., 691; Smith v. Perkins, 81 Texas, 154, 16 S. W., 805.

¹²² Winstead v. Evans, 33 S. W., 580.

¹²³ District Court Cases: Moore v. Hardison, 10 Texas, 467; Newsom v. Chrisman, 9 Texas, 113; Connell v. Chandler, 11 Texas, 249; Hefflefinger v. George, 14 Texas, 569; Ledbetter v. Swing, 19 Texas, 242; Reese v. Hamilton, 20 Texas, 668; Coupland v. Tullar, 21 Texas, 523; Timmins v. Lacey, 30 Texas, 116; Barclay v. Cameron, 25 Texas, 233; Oldham v. McIver, 49 Texas, 556; Franks v. Chapman, 60 Texas, 46, and 61 Texas, 580; Buchanan v. Bilger, 64 Texas, 589; Hamman v. Lewis, 34 Texas, 475.

County Court Cases: Ford v. Williams, 6 Texas, 311; Sheldon v. San Antonio, 25 Texas Supp., 177; Criswell v. Richter, 13 Texas, 18; King v. Longcope, 7 Texas, 239; Connally v. Renn, 17 Texas, 125; Haley v. Villeneuve, 11 Texas, 617; Railway v. Scott, 78 Texas, 360, 14 S. W., 791; Railway v. Cannon, 88 Texas, 312, 31 S. W., 498; Dimmit v. Salmon, 35 S. W., 752.

All Writs Necessary to Enforce Their Jurisdiction.

This clause really adds nothing to the jurisdiction of the courts, as this power is inherent in them. It is placed in the Constitution to cut off controversy or question, as to the lawful right existing in the court or judge, to issue any and all writs or process, known to the courts of either common law or equity, which may be needed to enable the tribunal to effectually discharge the important duties entrusted to it.

Appellate Jurisdiction of, and Supervision by District Courts in Probate Matters.

“The district court shall have appellate jurisdiction and general control in probate matters over the county court established in each county, for appointing guardians, granting letters testamentary and of administration, and probating wills; for settling accounts of executors, administrators, and guardians, and the transaction of all business appertaining to estates.”

This clause confers no original jurisdiction upon the district court in probate matters, but only gives it supervision and control over the county courts with regard thereto, which may be exercised either by appeal or by writ of *certiorari* as provided by statute. Hence no original proceeding such as application to probate a will can be begun there, except in cases of disqualification of county judges.¹²⁴

If, however, the cause of action be such that under the general principles of law the district court has jurisdiction over the subject matter, this jurisdiction is not defeated because an executor, administrator, or guardian is a necessary or proper party.¹²⁵

This explanation must be made: These courts, the district and the county court, not sitting as a court of probate, have jurisdiction over suits of this sort, but from considerations of public policy the law provides that such power should not be exercised as, to liquidated demands for money until an effort has been made to collect from the administrator or executor through the probate court. If the claim is allowed by the representative of the estate and is approved by the probate court, such approval becomes a judgment; if the claim is rejected by the representative of the estate, suit must then be brought on it within ninety days in the court having jurisdiction in the case, tested by ordinary standards. If the claim is allowed by the representative of the estate but disproved by the probate court, this is a judgment against the claimant and appeal will lie therefrom to the district court.¹²⁶

¹²⁴ Frank v. Chapman, 60 Texas, 46; Heath v. Lane, 62 Texas, 690; Buchanan v. Bilger, 64 Texas, 589.

¹²⁵ Williams v. Robinson, 56 Texas, 349; Timmins v. Bonner, 58 Texas, 559; Fisher v. Wood, 65 Texas, 204.

¹²⁶ Rev. Stats. 1895, arts. 2063 through 2090; Garrett v. Gaines, 6 Texas, 435; Merle v. Andrews, 4 Texas, 214; Robinson v. McDonald, 11 Texas, 385; Evans

There are also material limitations on the court's power to enforce its judgments rendered in such cases. Ordinarily the court rendering the judgment, carries it into effect and enforces it by its own process, but in these cases where moneyed judgments are recovered against an administrator or an executor subject to the probate court, there is no such power, but the district court enters judgment, fixing the amount and declaring what securities, if any, exist, and then certifies this judgment to the probate court where the estate is pending, for payment in due course of administration. Here we have an illustration of the existence of the first and second phases of judicial power, power of hearing, and power of adjudging, but the absence of the third, power of enforcing.¹²⁷

Suits may, however, be brought in the district court against an independent administrator of community property, or an independent executor under a will in same manner as against a party in his individual capacity.¹²⁸

There are numerous and interesting cases on the jurisdiction of the district, and of county courts not sitting in probate, over matters affecting the interests of persons who have inherited property. It seems to be definitely settled that the heirs of a person dying intestate are at once entitled to the possession and enjoyment of his estate, and that the administration is only allowed in order to protect the rights and interests of creditors; therefore, if no debts exist against the estate there is no necessity for administration, and the probate court has no jurisdiction to open one. It follows from this that in such state of facts the heirs can maintain any suit in the district or county court which the deceased person could have done, and that a suit for partition among them may be brought and maintained in the district court. It is the established rule that persons seeking to maintain suits as heirs in these exceptional cases must show the existence of facts relieving from the necessity of administration. This may be done either by affirmative allegations and proof that no facts existed at date of the death of the person from whom the inheritance comes requiring administration or such lapse of time since his death as to prevent administration.¹²⁹

v. Hardeman, 15 Texas, 480; *Bullian v. Campbell*, 27 Texas, 653; *King v. Cassidy*, 36 Texas, 531; *Ferrill v. Mooney*, 33 Texas, 290; *Blum v. Welborne*, 58 Texas, 157; *Watt v. White*, 46 Texas, 338; *Bason v. Hughart*, 2 Texas, 476; *Schmidt v. Huff*, 7 Texas Civ. App., 593; *Thorn v. State*, 10 Texas, 295; *Lewis v. Nichols*, 38 Texas, 54; *Carrol v. Carrol*, 20 Texas, 732; *Northercraft v. Oliver*, 74 Texas, 162, 11 S. W., 1121; *Cain v. Woodward*, 74 Texas, 549, 12 S. W., 319; *Taylor v. Snow*, 47 Texas, 462; *Thompson v. Jones*, 12 S. W., 79; *Smithwick v. Kelly*, 79 Texas, 564, 15 S. W., 486; *Fortson v. Caldwell*, 17 Texas, 627; *Paxton v. Meyer*, 67 Texas, 96, 2 S. W., 817; *McCormick v. McNeel*, 53 Texas, 15; *Jackson v. Mumford*, 74 Texas, 104, 11 S. W., 1061; *Williams v. Robinson*, 56 Texas, 347.

¹²⁷ Rev. Stats. 1895, art. 2068.

¹²⁸ *Jerrard v. McKenzie*, 61 Texas, 40; *Cleveland v. Cleveland*, 89 Texas, 445, 30 S. W., 825.

¹²⁹ *Cochran v. Thompson*, 18 Texas, 652; *Patton v. Gregory*, 21 Texas, 513; *Sanders v. Devereux*, 25 Texas Supp., 1; *Giddings v. Steele*, 28 Texas, 733; *Webster v. Willis*, 56 Texas, 468; *Fort v. Fitts*, 66 Texas, 593, 1 S. W., 563.

Original Jurisdiction and Control Over Executors, Administrators, Guardians, and Minors, Under Such Regulations as May be Prescribed by Law.

No provision similar to this is contained in any Texas Constitution prior to 1866. We find it in the Constitution of that date in the exact words in which it appears in the present. It was dropped from the Constitution in 1869, and was reincorporated in that of 1876. It is not self-operating, and as no statutes have been passed authorizing action thereunder, this original jurisdiction can not be exercised by the district court.

This clause and the one next preceding, as they appear in the Constitution of 1876, are parts of the same sentence. The powers of the courts thereunder have been several times passed upon, as considerable difference of opinion was entertained by members of the bar as to the jurisdiction of the district and county courts over suits connected with or growing out of estates. Probate jurisdiction properly includes the opening of administration in proper cases on the estates of deceased persons, minors, and others not *sui juris*; the appointment of some one to represent the estate; the general supervision and control of the estate until the purposes for which it is being administered are accomplished and a settlement is had between the representative and the beneficiaries. Matters outside of these and which involve legal rights and duties between the estate and third parties not sustaining any fiduciary relation to the estate are not matters of probate jurisdiction. These distinctions are sometimes difficult to apply. For instance, the settlement of the accounts between an administrator and the estate, so long as he remains in office, are matters strictly within the power of the probate court. If, however, the administrator should die or abscond, or resign without having first made a settlement, and an administrator *de bonis non* were appointed, suit by him against his predecessor and his sureties must be brought in the district or county court for civil business according to the amount involved.¹³⁰ In 1876, the Legislature, not having in view the distribution of power among the different courts created in the Constitution, undertook to confer upon the probate court jurisdiction to render judgment against the bondsmen of defaulting guardians and their sureties.¹³¹

In the case of *Timmins v. Bonner & Long*,¹³² this legislation came before the Supreme Court for construction and enforcement. The court very carefully compared the various provisions of the Constitution with reference to probate matters, and came to the conclusion that the attempt to confer this power on the probate court was unconstitutional

¹³⁰ *Portis v. Cummins*, 14 Texas, 140; *Davis v. Harwood*, 70 Texas, 71, 8 S. W., 58; *Long v. Wooters*, 18 Texas Civ. App., 35, 45 S. W., 165.

¹³¹ Rev. Stats. 1879, arts. 2695, 2696.

¹³² 58 Texas, 554.

and void, and that suit, contemplated by the statute, could be brought only in the district court or in the county court in exercise of its civil jurisdiction according to the amount involved. This case reviews at length the preceding decisions by the Supreme Court upon the subject and is most instructive.

In *Nicholson v. Harvey*,¹³³ decided February 21, 1894, the Court of Civil Appeals held that after an administration is closed the probate court has no jurisdiction of a suit by the widow and children of the decedent against the administrator and his attorney to set aside the sale of land made through the probate court on account of alleged fraud in procuring and conducting the sale.

In the case of *Telschow v. House*,¹³⁴ decided June 20, 1895, it is held by the Court of Civil Appeals that as the homestead of a family formed no part of the estate of a decedent, subject to administration in the probate court, the district court has jurisdiction to foreclose a mechanics' lien on such homestead in a suit brought against the surviving wife and children, after the death of the husband and father.

Richardson v. Knox,¹³⁵ decided October 3, 1896, is a suit brought in the probate court by the guardian of the estate of a minor against a former guardian and his sureties for two thousand dollars and damages, relying upon the articles of the Revised Statutes above referred to. Suit was entertained and judgment rendered for the plaintiff; appeal was taken to the district court, and judgment was again rendered for the plaintiff. Upon appeal to the Court of Civil Appeals, the whole proceeding was adjudged void for lack of jurisdiction in the probate court.

The case of *Albright v. Allday*,¹³⁶ decided October 3, 1896, was a suit in the district court against an administrator to establish a debt and mortgage against the estate, which had been presented to the administrator and rejected by him. The point was made that under the statute the district court could not adjudge the mortgage lien. The position was overruled by the Court of Civil Appeals.

In *Attridge v. Maxey*,¹³⁷ decided December 19, 1896, the Court of Civil Appeals held that the creditor of an heir entitled to an interest in an estate being administered in the probate court could not institute a proceeding in the probate court to have such interest subjected to the payment of his debt.

In *Miers v. Betterton*,¹³⁸ the widow of an intestate, who was administratrix of his estate, refused to place on the inventory a tract of land

¹³³ 25 S. W., 458, decided February 21, 1894.

¹³⁴ 10 Texas Civ. App., 671, 32 S. W., 153.

¹³⁵ 14 Texas Civ. App., 402, 37 S. W., 189.

¹³⁶ 37 S. W., 646.

¹³⁷ 15 Texas Civ. App., 134, 39 S. W., 323.

¹³⁸ 45 S. W., 430.

deeded to him because she claimed that it was her separate property. Motion was made in the county court to compel her to do so. She resisted the motion, setting up her title. It was held that the county court had no jurisdiction to try the issue thus joined and that the motion should have been dismissed, and the parties compelled to go into the district court.

Dodson v. Wortham,¹³⁹ is a suit brought in the probate court by one claiming an interest in an estate, which had been paid into the State Treasury under article 2202 of the Revised Statutes. The amount was seventeen hundred and eighty-one dollars. Question was raised as to the jurisdiction of the probate court. The court held that the proceeding was but a continuation of the administration, and was within the jurisdiction of the probate court.

Shall Have Appellate Jurisdiction and General Supervisory Control Over the County Commissioners Court, With Such Exceptions and Under Such Regulations as May be Prescribed by Law.

This was added in the amendments of 1891. There has been no legislation under it. In the general road law, passed February 5, 1884,¹⁴⁰ jurisdiction of appeals in cases of damages for opening roads under ordinary conditions is given to the county court. In the act passed the next day,¹⁴¹ the Legislature provided for opening, in all counties in which sufficient road facilities did not exist, roads leading directly to the county seats of adjoining counties; and in these cases it gave the appellate jurisdiction to the district courts.

In the case of *Taylor v. Travis County*,¹⁴² the commissioners court had opened a road across the lands of Taylor under the general statute of February 5th. Taylor was dissatisfied with the amount of damages and attempted to appeal from the judgment. He took an appeal to the district court, from which it was dismissed for want of jurisdiction. Appeal was taken from this judgment and it was affirmed by the Supreme Court. In the opinion, the court distinguishes between these statutes and holds that the proceeding in that case was under the first, and hence by statute should have gone to the county court. The point as to the validity of the provision of the Act of February 6th, providing for appeals in the special cases coming within it to the district court, was not passed on. These statutes have not been changed by the Legislature, and the Court of Civil Appeals, in the case of *Bell v. Palo Pinto*

¹³⁹ 45 S. W., 858.

¹⁴⁰ Acts 1884, p. 20.

¹⁴¹ Acts 1884, p. 63.

¹⁴² 77 Texas, 333, 14 S. W., 137.

County,¹⁴³ decided that the amendments of 1891 did not repeal the Act of February 5th, as to appeals to the county court in ordinary road cases, but that such appeals must still be taken to that court.

General Original Jurisdiction Over All Causes of Action Whatsoever for Which a Remedy or Jurisdiction is Not Provided by Law or This Constitution.

This is a new provision of extreme importance. As has been already stated, from the decision in *Titus v. Latimer*,¹⁴⁴ until the adoption of these amendments, the Legislature of the State had been hampered by the doctrine that every court created by the Constitution was a court of limited and enumerated powers; and the strict enforcement of this doctrine led to serious practical embarrassments. This clause removes this difficulty, and now if any legal right is violated, the injured party, unless the right to try his case has been affirmatively given to some other court, can resort to the district court. This difference has been recognized by the courts in numerous cases.¹⁴⁵

COUNTY COURTS—DETAILED CONSIDERATION.

Many of the authorities already cited and discussed relate quite as directly to the jurisdiction of the county as of the district court. Reference will be made to them again only when it may seem to be necessary. There are some further matters, however, proper to be considered here.

Jurisdiction of the County Court Dependent on the Amount in Controversy.

There are many cases in which jurisdiction is fixed only by the amount in controversy, without reference to the nature of the suit or its subject matter. This jurisdiction is of two kinds: first, exclusive, which exists in all cases in which the subject matter involved does not of itself give jurisdiction to the district court and in which the amount in con-

¹⁴³ 29 S. W., 929, 1895.

¹⁴⁴ 5 Texas, 433, 1849.

¹⁴⁵ *Kaufman County v. McGaughey*, 3 Texas Civ. App., 655; *Gamel v. Smith*, 3 Texas Civ. App., 22, 21 S. W., 628; *Kountze v. Cargill*, 22 S. W., 227, in Court of Civil Appeals: same case in Supreme Court, revising Court of Appeals' judgment, 86 Texas, 386, 22 S. W., 1015.

troverſy exceeds two hundred dollars and does not exceed five hundred dollars, excluſive of intereſt and coſts; ſecond, concurrent with the diſtrict courts, which exiſts in all civil caſes in which the amount in controverſy exceeds five hundred dollars and does not exceed one thouſand dollars, excluſive of intereſt and coſts, excluſive juriſdiction over which has not been expreſſly given to ſome other court.

Where the amount is juſt two hundred dollars or leſs, the juriſdiction is excluſive in the juſtice court. Where it is juſt five hundred dollars is excluſive in the county court.¹⁴⁶

It is ſettled that the clauses now under diſcuſſion give juriſdiction only in thoſe caſes in which it is dependent *ſolely* upon the amount in controverſy.

The caſes giving rules applicable in eſtimating the amount in controverſy have been given under "Diſtrict Court."

The county court may enter final judgment on all bail bonds forfeited by it in criminal caſes pending before it, whatever the amount.¹⁴⁸

Article 1157, given above,¹⁴⁹ denies to the county court juriſdiction of certain caſes in which the Conſtitution gives juriſdiction to the diſtrict court, and only makes clear the legislative intent that the caſes ſpecified ſhould be excluſively in the juriſdiction of the diſtrict court. The correſponding clauses of the diſtrict court article have been ſeparately conſidered, and the numerous caſes bearing thereon cited and commented upon.

Appellate Jurisdiction of the County Court.

The county courts have appellate juriſdiction in civil caſes over which juſtice courts have original juriſdiction, when the judgment appealed from or the amount in controverſy exceeds twenty dollars, excluſive of coſts.¹⁵⁰ The Conſtitution gives the right of appeal only when the *judgment* ſhall exceed twenty dollars; the ſtatutes add the words "the amount in controverſy." The change is a very material one; but, under the extenſive power over county courts conferred by the Conſtitution, is doubtleſs valid. The judgment of the county courts in all caſes appealed to them is final, unleſs the amount in controverſy or the judg-

¹⁴⁶ *Railway Co. v. Rambolt*, 67 Texas, 654, 4 S. W., 356; *Garrison v. Express Co.*, 69 Texas, 345, 6 S. W., 842; *Carrol v. Silk*, 70 Texas, 23, 11 S. W., 116.

¹⁴⁸ Rev. Stats., art. 1156.

¹⁴⁹ Ante, p. 100.

¹⁵⁰ Rev. Stats. 1895, art. 1158.

ment rendered shall exceed one hundred dollars exclusive of interest and costs.¹⁵¹

The county court also has jurisdiction over cases brought from the justice court by *certiorari*. In all cases coming to the county court from the justice court, whether by appeal or *certiorari*, the trial in the county court is *de novo*, and not upon the record of the former trial. All pleadings must be presented and witnesses examined, and other testimony may be introduced, as though no trial had been had in the justice court.¹⁵²

The jurisdiction of the court and the authority of county judges to grant writs has been sufficiently considered in connection with the district courts.

Appellate jurisdiction from county commissioners courts in assessment of damages in laying out county roads under Act of February 5, 1884, is conferred upon the county court. This jurisdiction has been sustained by the Supreme Court.¹⁵³

In many counties in the State the civil jurisdiction of the county courts has been transferred to the district court.¹⁵⁴

County courts also have original jurisdiction of proceedings in exercise of the right of eminent domain to condemn property for the use of railroad companies. The statutes on the subject are quite extensive, giving very explicit directions for the manner of exercising this power.¹⁵⁵

TIME AND PLACE.

A court can not exercise its jurisdiction at a time or place not specified by law.¹⁵⁶

¹⁵¹ Rev. Stats. 1895, art. 996, sec. 3; *Cox v. Wright*, 27 S. W., 294; *Tufts v. Hodges*, 8 Texas Civ. App., 240, 28 S. W., 110; *Bohannon v. Roensch*, 13 Texas Civ. App., 218, 35 S. W., 874; *Emerson v. Emerson*, 35 S. W., 425; *Cadwallader v. Lovece*, 10 Texas Civ. App., 1, 29 S. W., 667; *Crosby v. Crosby*, 92 Texas, 441, 49 S. W., 359.

¹⁵² Constitution, art V, sec. 16. For statutory provisions regarding appeals, see Rev. Stats. 1895, title 33, chap. 17, and *Certiorari*, title 15, chap. 2.

¹⁵³ Rev. Stats. 1895, 4693, et seq.; *Taylor v. Travis County*, 77 Texas, 333, 14 S. W., 137; *Bell v. Palo Pinto County*, 29 S. W., 929.

¹⁵⁴ *Batts' Stats.*, p. 578, et seq.

¹⁵⁵ Rev. Stats. 1895, chap. 8.

¹⁵⁶ *Doss v. Waggener*, 3 Texas, 515; *Whitener v. Belknap*, 89 Texas, 273, 34 S. W., 594; *Wilson v. State*, 35 S. W., 390; *Williams v. Reutzel*, 29 S. W., 374.

CHAPTER VII.

JOINDER AND MISJOINDER OF CAUSES OF ACTION, AND
CONSOLIDATION OF SUITS.

RULES IN DIFFERENT SYSTEMS.

Different systems of jurisprudence differ materially with reference to the proper joinder of causes of action. The rules governing the practice are founded almost entirely upon considerations of public policy, and are to a large extent arbitrary. Under the common law, with its separate courts of law and of equity, different rules obtained in these respective courts, the rules in common law courts against combining different causes of action in the same suit being strict, while in equity they were more liberal. The civil law was, in this respect, even more liberal than equity. The Texas practice is very largely derived from the equity and civil law procedure, and greater latitude is allowed here than under any one of the systems mentioned.

MULTIPLICITY OF SUITS TO BE AVOIDED.

The primary rule on this subject is the same in every system of procedure, viz., that the law abhors a multiplicity of suits. Hence, when litigation is begun between two parties, it should be as comprehensive as is practicable, and should include as many of the differences existing between them as may be litigated together with due regard to orderly procedure and the rights of others. This rule has peculiar significance and force in our system, where every suit is an *action on the case* and the parties are entirely free from limitations growing out of forms of action.

This may be well illustrated by a few Texas cases.

In *Chevalier v. Rusk*,¹ the plaintiff had placed two executions and one citation in the hands of the defendant as sheriff. The latter had declined to serve either process. The plaintiff sued for all the breaches of duty in one suit. The defendant demurred to the petition on the ground of misjoinder of causes of action. The court discussed the question, citing numerous authorities, and held that there was no misjoinder, using the following language: "Civil law authorities have kept in view the

¹ Dallam, 613, 1844.

same principle here decided, and the general rule laid down by them is, that all demands, not inconsistent with each other, must be joined in one action. Both systems equally agree in condemning a multiplicity of suits and an accumulation of costs.

"Under our statutes intended to simplify the rules of pleading, no distinctions as to forms of action are recognized, and a great latitude, not tending to manifest confusion, may be allowed in the joinder of actions.

"This court has already decided in *Binge and Blair v. Smith* (post, 616), that where the plaintiff has two causes of action which may be joined in one, he ought so to proceed, and if he sever he should be *compelled* to consolidate. This decision concurs with the general rule laid down by the common law authorities, which is stated to be, 'that when the *same plea* may be pleaded, and the *same judgment* given on all the demands, or when the *same judgment* is to be given though the *pleas be different*, they may be joined.'"

In *Morris v. McKinney*,² suit was brought by the plaintiff, who claimed a large tract of land against two defendants who severally claimed separate portions of the tract. Objection was made as to the improper joinder of causes of action and of defendants. The objection was overruled, the court saying:

"We will direct our attention to the two latter grounds of demurrer alone, they having been the only points relied upon by counsel for a reversal or affirmance of the judgment below. And these two are so closely allied that the decision of one almost by necessity involves that of the other. On the subject of multifariousness, we can only arrive at correct conclusions by applying the general principles, established by various authorities, to the particular case under consideration, and determining therefrom whether there is such a misjoinder in parties either as to interest or person as would warrant the court in sustaining an exception on that ground. In 2 Maddock, page 294, it is laid down 'that the courts will not permit a plaintiff to demand by one bill several matters of different natures against several defendants; and the reason given for this rule is the plain and obvious one, that thereby costs might unjustly and erroneously accumulate against a party by the delay incident to the adjudication of the rights of a *codefendant*, with whom he was in no way interested.

"In Comyn's Digest, 7, Chancery, p. 2, the principle is expressed, that all interested in the 'demand ought to be parties in equity and in examining the various expressions of various judges and authors on this subject, we might probably arrive at the general principle, as laid down by Calvert on Parties (p. 6, chap. 1, sec. 1), 'that all interested in the object of the suit should be parties.' In the case of the Mayor

² Dallam, 621, 1844.

of *York v. Pilington*, a general right of fishing was established against many persons, unconnected and claiming several and distinct rights therein, on the principle 'that there was one common interest in all the parties defendant, centering in the point in issue.' Apply these principles to the case under consideration. The 'object' of the suit is to establish the plaintiff's right to an entire tract of land, part of which 'entirely' are claimed by defendants. The point in issue is the correctness of the *plaintiff's claim*; and a common interest on the part of the defendants centers in that point. The decree of the court establishing that right for the plaintiff could be given without embarrassment or difficulty, and multiplicity of actions, which is abhorrent to the principles of equity, avoided. We can therefore have but little difficulty in arriving at the conclusion that the parties are properly joined, and that the judge below erred in sustaining the demurrer."

In *Clegg v. Varnell*,³ in discussing the question of multifariousness, the court says: "Two executions, on distinct judgments, recovered by distinct plaintiffs against the husband, were levied on the property of the wife, and the question is, must she institute a separate suit for injunction against each plaintiff in the executions, or may she join them as defendants, and thus in a single suit settle the question as to her right in the property?"

"Judge Story, in his treatise on Equity Pleadings, defines multifariousness to be the improperly joining in one bill distinct and independent matters against one defendant, or the demand of several matters of a distinct and independent nature against several defendants. In the latter case, the proceeding would be oppressive, because it tends to load each defendant with an unnecessary burden of costs, by swelling the pleadings with the statement of the several claims of the other defendants, with which he has no connection. In the former case, the defendant would be compellable to unite in his defense different matters wholly unconnected with each other, and great delays occasioned by waiting for the proofs respecting one of the matters, when the others might be ripe for a hearing. Sec. 271.

"As an example of multifariousness, it is said that if an estate be sold in lots to different persons, the purchasers could not join in a bill against the vendor; for each party's case would be distinct, depending on its own peculiar circumstances; for the same reason the vendor would not be allowed to sue in one bill all the purchasers, for specific performance. *Id.*, sec. 272. On the other hand, it is said that a bill will not be multifarious because it joins two good causes of complaint, growing out of the same transaction, where all the defendants are interested in the same claim of right, and where the relief asked for in relation to each is of the same general character. *Id.*, sec. 284.

³ 18 Texas, 302, 1857.

In section 533 it is stated as the result of the authorities, that where there is a common interest and a common liability in the defendants, and a common interest in the plaintiffs, different claims to property (if the subjects are such as may without inconvenience be joined) may be united in one suit. Thus a bill is not necessarily multifarious by reason of its seeking to redeem two distinct mortgages of different pieces of real estate; or of its seeking specific performance of different contracts relating to different parcels of real estate. 12 Metc., 323.

"A bill has been sustained by the owner of a sole fishery, against several persons who claimed under distinct rights, and also by seventy-two underwriters to sustain several actions upon different policies of insurance effected by the defendants upon different ships. 3 Price, 164. The latter case may perhaps be subject to some question. In *Gaines and Wife v. Chew et al.*, 2 Howard, 619, it was held that a bill filed against the executors of an estate and those who purchased from them, is not upon that account alone multifarious. In the opinion, the court said that a bill might have been filed against each of the defendants, but the question is whether they may not all be included in the same bill. The complainant claimed as devisee or as heir at law of the deceased, and whether she claimed as one or the other, there was no misjoinder of claims. The defendants claim mediately or immediately under the will of 1811, although their purchases were made at different times and for distinct parcels of the property. They have a common source of title, but no common interest in the purchases. The facts of the purchase, including notice, may be peculiar to each defendant, but these may be ascertained without inconvenience and expense to the codefendants. In every fact that goes to impair or establish the authority of the executions, all of the defendants are interested. In its present form, the bill avoids multiplicity of suits, without subjecting the defendants to inconvenience or unreasonable expense.

"In section 539 of *Equity Pleadings*, by Story, the author states, as a conclusion from the authorities, that there is not any positive inflexible rule as to what constitutes multifariousness, such as will be fatal to the suit on demurrer. The courts have always exercised a sound discretion in determining whether the subject matters of the suit are properly joined or not. *Campbell v. Mackay*, 1 Mylne & Craig, 603; *Oliver et al. v. Piatt*, 3 Howard, U. S. Rep., 411, 412.

"The substance of the rules on this subject appears to be, that each case must be governed by its own circumstances, and whether it be multifarious or not, must be left, in a great measure, to the sound discretion of the court.

"The defendants ought not to be put to inconvenience and expense in litigating matters in which they have no interest; and, on the other hand, unnecessary litigation and multiplicity of suits should be avoided.

While defendants are protected, plaintiffs must not be put to the necessity of bringing two suits instead of one. 3 Mylne & Craig, 85; 7 Sim., 241, 254.

"The rule against multiplicity of suits has peculiar force in our system of procedure. Within reasonable limits it is the cardinal principle as to joinder of parties and causes of action. Even jurisdictions which are distinct and separate in other States, are blended in our system; and legal and equitable causes of action and grounds of defense may be adjusted in a single controversy.

"In the case before us, the plaintiffs in the executions, who are made defendants in this suit, are alike interested in every fact which may go to establish or defeat the right of the wife, as against the husband, to the property. Surely a claimant attempting to restrain the sale of his property under execution against another person, is not to be compelled to institute suit against each plaintiff in execution where there is but one common matter in dispute, and that is whether the property belongs to the claimant or to the defendant in the executions. To state the proposition is to answer it. The fact that Feeny is absent in California, and that there may be some delay before he could be cited by publication, is no such unreasonable inconvenience to Varnell as to impose on Mrs. Clegg the necessity, expense, and trouble of bringing two suits instead of one, when the main object of both suits would be an inquiry as to her right in the property."

This general rule against multiplicity of suits is not, however, to be pressed too far, either in its application in cases pending, or in determining the effect of judgments rendered. In each respect it is the subject of limitations as well established and as beneficial in their effect as the rule itself.

JOINDERS OF ACTION FOR BREACH OF CONTRACT AND FOR TORT.

In all systems the distinction between suits arising *ex contractu* and those arising *ex delicto* is recognized, and the primary and most important rule forbidding the joinder of actions is that a cause of action founded upon breach of contract can not be joined with one arising from a tort, except in those instances in which the two grow directly out of, or are immediately connected with, the same matter.⁴

It will be more satisfactory to consider these two classes of causes of action separately.

⁴ Stewart v. Gordon, 65 Texas, 344; Railway Co. v. Shirley, 54 Texas, 148; Hooks v. Fitzenreiter, 76 Texas, 279, 13 S. W., 229; Cf. Chapter on Defendant's Answer.

CONTRACTS—JOINDER OF CAUSES OF ACTION ON.

Whenever two or more causes of action for liquidated amounts exist between the same parties in the same capacities, and no others are interested, whether they arise from breaches of different contracts or from different breaches of the same contract, they may be litigated in one suit. If all such causes of action under all the contracts be in one of the parties, he may join them all in his suit against the other. If some of the causes of action be in one party and some in the other, each may by appropriate pleadings present his rights. The court will consider them all and will render judgment in favor of him who is entitled to a balance upon a comparison of claims.

If, however, the parties to the several contracts out of which the causes of action arise are different, or if the party or parties claiming the rights claim in different capacities, or if the defendants are liable in different capacities, it is a rule of almost universal application that the causes of action can not then be joined.⁵ In a few exceptional cases, however, a joinder of such causes of action is not only permissible but very desirable. In *Love v. Keowne*,⁶ administrators were appointed on an estate, gave bond, and received the property. After they had conducted the affairs of the estate for awhile the probate court required the administrators to give a new bond, relieving the first sureties from liability for any wrongs occurring thereafter, but leaving them responsible for any former default. The administration was continued under the security of the new bond for some time, when the heirs claimed that there was a large deficit in the property. They brought suit against the administrators, joining both sets of bondsmen, because, as they alleged, it was impossible for them, the heirs, to ascertain and state to the court when the several misapplications of the property took place, or how much of the default occurred while the first bond, and how much while the second, was in force. The several bondsmen plead in abatement misjoinder of causes of action and raised same points by exception.

The district court sustained the plea as to misjoinder of causes of action and of parties, and dismissed the suit. The Supreme Court reversed the judgment on this point, in the opinion using this language: "The jurisdiction of the court below was one of blended law and equity, and the policy of our law has ever been to avoid a multiplicity of suits. If separate suits had been brought and a discovery sought in

⁵*Thompson v. Bohannon*, 38 Texas, 243; *Lyon v. McDonald*, 78 Texas, 498, 14 S. W., 261.

⁶58 Texas, 199, 1882.

each, the proceedings, evidence, and judgment in the one would not have been binding upon the sureties in the other, and between the two, the plaintiffs may have failed to have obtained the relief, if any, to which they may be entitled. In the suit as brought, all the parties in interest were before the court. The general subject matter and object sought were the same; the plaintiffs claimed relief in the same general right, and the proceedings and decrees could have been adjusted to the respective rights and interests of all the parties to the suit, and would have been binding upon them.

"It has been found impracticable to lay down any positive general rule as to what will or will not constitute multifariousness, but the courts have wisely left the question as one of convenience, to be decided according to the peculiar circumstances of the case. As said by McLean, J., in *Gaines v. Chew*, 2 How. (U. S.), 619: 'Every case must be governed by its own circumstances and as they are as diversified as the names of the parties, the court must exercise a sound discretion on the subject.' It is said in the notes to the leading case of *Fellows v. Fellows*, 4 Cowen, 682, in 15 American Decisions, 428, that perhaps the best general rule that can be laid down is that stated by Wilde, J., in *Dimmock v. Bixby* 20 Pick., 377, that the objection of multifariousness does not hold 'where one general right is claimed by the plaintiffs, although the defendants may have separate and distinct rights.'

"There are numerous authorities to the effect that, 'to render a bill multifarious, it must contain not only separate and distinct matters, but such that each entitles the complainant to separate equitable relief. It is not so if it be single as to the subject matter and object thereof, and the relief sought, if all the defendants are connected, though differently, with the whole subject of dispute.'"

Motion for rehearing was made and overruled, the court saying:

"The main grounds relied upon for a rehearing are based upon a supposed misjoinder of parties and causes of action.

"The breach of each of the bonds doubtless constitutes a cause of action against the makers of the several bonds, ordinarily separate and distinct; but the relation of two sets of sureties may be such to the subject matter of litigation, which in this case is the estate, that came into the hands of the administrators, that they may be joined in one action, and in which it may become eminently proper that all the sureties should be joined, not only for the protection of those interested in the estate, but also for the purpose of adjusting the equities existing among the sureties themselves.

"In a court of equity this is always desirable, in order to do complete justice between all parties without a multiplicity of suits.

"The demurrer admits the *devastavit*; that by reason of the loss of the papers of the estate the plaintiffs are unable to ascertain with accuracy the extent of the *devastavit* prior to the time the second bond was

executed; and that prior to the execution of the second bond, one of the administrators, in connection with those persons who became sureties upon the second bond, united in a misapplication of a part of the trust estate, and that these sureties, for their own indemnity, received the proceeds of such misapplication and have applied the same to their own use.

"This state of facts connects the last sureties with the subject matter of this suit at a time prior to their becoming sureties at all; and also connects them after they became sureties with a trust fund which not only those interested in the estate may follow, but which the sureties upon the first bond may follow for their own protection; and upon the plainest principles of equity procedure, it would seem that they should all be joined, to enable the court to make a decree that would be just and binding upon all."

This question is again considered in the case of *Williams v. Robinson*.⁸ Adkison was administrator on estate of Kermin and gave bond as such. He was also engaged in mercantile business as member of the firm of J. S. Williams & Co. He took possession of the assets of the estate. He died. Robinson was appointed administrator *de bonis non* of Kermin's estate. He claimed that Adkison had not accounted for the property in his hands belonging to the estate, but had used it in carrying on his partnership business. He sued the sureties of Adkison on his bond as administrator for the property misused by him and joined the members of the firm to which Adkison had belonged, claiming from them the value of the property used by the partnership. The defendants plead misjoinder of causes of action. The plea was overruled by the district court. On appeal this ruling was reversed in the following language: "The exception taken by defendants for misjoinder of parties ought to have been sustained; the plaintiff's petition was obnoxious to the objection that it was multifarious in joining matter of a distinct and independent nature, and which involved wholly different rules as to the measure of liability against several defendants. The sureties of Adkison on his bond as administrator, if liable, were so in consequence of a maladministration or *devastavit* by their principal; the copartners of Adkison, if liable, were so in virtue of their partnership relations and participation with their partner, Adkison, in the alleged conversion of the cotton.

"There existed no privity of relation nor community of action between these sets of defendants whereby a common or an alternative liability of all of them could be maintained. The right of recovery against one set or class, under the allegations made in the petition,

⁷ *Love v. Keowne*, 65 Texas, 152.

⁸ *Williams v. Robinson*, 63 Texas, 76, 1885.

would preclude a recovery against the other class; there existed no necessary nor approximate relation between them, nor any common principle or rule of liability applicable to the case under which they all alike might be held liable. Under the exposition of the rule applicable to the subject laid down in *Clegg v. Varnell*, 18 Texas, 300, we are of opinion that the court erred in overruling the exceptions. See also *Frost v. Frost*, 45 Texas, 340; *Love v. Keowne*, 58 Texas, 191.

"It would seem that, ordinarily, if a plaintiff, being uncertain as to the facts on which his case rests, or as to which of various persons, to be shown by the proofs to be made, are liable to his cause of action, he will not be permitted to solve the doubt by embracing each and all of them as defendants in his suit except under allegations showing such privity between them in respect to the subject of litigation as will show at least a contingent or alternative right to recover against any of the defendants on the general basis he has laid for a recovery against the others. He can not under ordinary circumstances make a hypothetical case in his petition upon a given state of facts showing a good cause of action against one defendant, and in the same petition base a right to recover on a different cause of action for the same matter or subject of suit against another and a different defendant. He must in such a case sue them separately, if he sues at all, and he can not impose on either the delays, inconveniences, and costs which may ensue by joining them in the same suit."

It should be observed that this was an effort to join a suit on contract against the bondsmen with a suit for tort against the partners, but this fact is not noticed in the opinion.

In *Screwman v. Smith*,⁹ Smith had been treasurer of the plaintiff association for two terms, having different bondsmen for the different terms. He was charged with misapplication of money belonging to the association, and separate suits were brought for different sums against him and his two sets of bondsmen respectively. The association moved for a consolidation of the two suits. Neither the petitions filed in the cases nor the motion to consolidate alleged that the plaintiff did not know and was not able to ascertain at what time the several alleged defalcations occurred. The Supreme Court held that the plaintiff had not brought itself within the rule authorizing the consolidation of suits, and intimated that legislation upon the subject was desirable. This is still the rule in suits on bonds and other contracts between private persons.

Such serious difficulty, however, was experienced in collecting from defaulting officers with several sets of bondsmen, that on April 13, 1897, the Legislature passed an act regulating the practice as to joinder of

⁹ *Screwman v. Smith*, 70 Texas, 171, 1888.

causes of action and of parties in suits by the State or any county on official bonds as follows:

"Art. 1205. In any suit brought by the State of Texas, or any county of said State, against any officer who has held an office for more than one term and has given more than one official bond, the sureties on each and all of such bonds may be joined as defendants in one and the same suit, whenever it is alleged in the petition that it is difficult to determine when the default sued for occurred and which set of sureties of such official bonds is liable therefor.

"Art. 1206. In any suit by the State of Texas upon the official bond of any State officer, any subordinate officer who has given bond, payable either to the State or to such superior officer, to cover the default sued for, or any part thereof, together with the sureties on his official bond, may be joined as defendants in one and the same suit with such superior officer and his bondsmen, whenever it is alleged in the petition that both of such officers are lable for the money sued for, to the end that all equities may be adjusted between them in one suit.

"Art 1207. Whenever any official bond is made payable to the State of Texas, or any officer thereof, and a recovery thereon is authorized by or would inure to the benefit of parties other than the State, suit may be instituted on such bond in the name of the State alone for the benefit of all parties entitled to recover thereon."

TORTS—JOINDER OF CAUSES OF ACTION FOR.

There is the same indefiniteness in regard to suits on torts as on contracts. There are several cases which hold that where several causes of action are in the plaintiff in the same capacity and against defendant in same capacity he may join all in the same suit. In *Carter v. Wallace*,¹⁰ the court says: "At common law the joinder of actions often depends on the *form* and not the *right* of action. Thus, trespass can not be joined with trover, not because the *rights* asserted in these actions are inconsistent, but because, as it is said, the joinder depends on the *form* of action and the judgments are different; that in trespass being strictly *quod capialur*, and that in trover *quod sit in misericordia* (1 Term, 277; 16 J. R., 146); and the objection could be taken advantage of by writ of error.

"Here no such distinctions exist; and no reason is perceived why distinct injuries, occasioned by a trespass upon lands, and a tortious conversion of personal property may not be joined in the same action, since the *forms* of action of the common law are not recognized in our

¹⁰ 2 Texas, 208, 1847.

courts, but every *right* of action may be asserted upon its own peculiar facts and circumstances, without regard to form. All our actions are in the strictest sense, though not in a technical sense, *special actions on the case*, being what the actions framed under the statute of Westminster 2d have been described, actions 'whereby the suitor has ready relief, according to the exigency of his business, and *adapted to the specialty, reason, and equity of every case.*' 3 Com., 51. It may be truly said here, with a slight variation of the language of Lord Hardwicke, 1 East, 226, that wherever the common or our statute law recognizes or creates a legal right, for a violation of that right the injured party may bring a *special action on his own case*, by a petition framed according to the peculiar circumstances of his own particular grievance. In our petition the technical distinctions and artificial boundaries of the common law actions constitute no element and have no place; but its only requisites are, that it shall disclose a *right*, an *injury*, and a *remedy*, the facts which constitute the plaintiff's right, the injury committed by the defendants, and a specification of the relief sought. It is subject to no such test as, Does it pursue the form of *trespass*, or *trover*, or any one of the common law actions, but the inquiry is, Does it disclose *any* valid, substantial cause of action?"

Dobbin v. Bryan¹¹ was a suit against an administrator and three others to enforce against the former an obligation of the deceased, alleging that the administrator and the other defendants had conspired to defraud the estate by fraudulently bidding in its property below its value, etc. Objection of misjoinder of causes of action and parties was urged. The court says: "There has been another ground presented by the counsel for the plaintiff in error on which he supposes the demurrer ought to have been sustained in the court below. He says the petition is multifarious. This is an objection that I have thought can seldom be sustained, and entitled to no liberality of construction in its favor. It savors so much of the technicality of a common law court that it must have found its standing in chancery practice as an interloper from the common law practice. If the petition confines itself to the adjustment of all the equities arising between the parties, however various those equities may be in their origin, I know of no sound principle governing the exercise of chancery jurisdiction that would restrain the court from disposing of all such matters without driving the party to another and distinct suit. If, however, there were matters contained in the petition foreign to the relief sought, it could not be reached by a general demurrer. Such matters should be specially pointed out, and if the objections were well taken, could be stricken out without destroying the matter that was well presented.

¹¹ 5 Texas, 285.

In no aspect, however, can the petition in this case be considered obnoxious to the objection raised by the counsel for the plaintiff in error."

Since the case of *Morris v. McKinney*,¹² it has been uniformly held that where one person owns real estate and many persons severally take possession of different parts of it, he may sue each separately or all, or any number less than all, in one action.

There are a great many other decisions in our reports on this subject, but there is no course of adjudication in which the courts have more persistently adhered to the policy of refusing to announce or hold to rule than in this, and it is impossible to formulate any clear and practicable statement which can be taken as a test to be applied in all cases. The matter is one largely in the discretion of the court upon all the facts and circumstances of each case as it arises.

EFFECT OF MISJOINDER.

When causes of action are improperly joined, the defendant should plead the defect in abatement, presenting the point by exception where the facts appear of record, and by verified plea setting out the facts when they do not; and the court should require the plaintiff to elect which of the causes of action he will retain and to dismiss the other without prejudice. If the court has jurisdiction of the case after such dismissal, it should proceed to hear it. The costs occasioned by the misjoinder should always be taxed against the plaintiff. If the plaintiff is of the opinion that the court is wrong in its ruling requiring him to elect between causes of action set out, he should except to the ruling and reserve the point for decision in the appellate court. If the plaintiff declines to elect, the court should strike out so much of the petition as in its judgment would cure the objection and proceed with the remainder, or, if it had no jurisdiction of the remainder, dismiss the whole case. In either case the plaintiff could save the point by exception.

Statutory provisions with reference to joinder of causes of action in this State are very few; but there are several regarding joinder of parties, one of which has been already quoted;¹³ others will be noticed under "Parties."

¹² *Dallam*, 611, 1844.

¹³ *Infra*, Chapter VIII.

CONSOLIDATION OF SUITS.

In the general practice act passed on the 13th of May, 1846, by the first Legislature, there was a section with reference to the consolidation of suits which has been continued through all the practice acts to the present time and is still in force.¹⁴ Its terms are as follows: "Where any plaintiff shall bring in the same court several suits against the same defendant for causes of action which should have been joined, he shall recover the costs of one action only, and the costs of the other actions shall be adjudged against him unless sufficient reasons appear to the court for instituting several actions." It will be observed that no rule is given for determining when causes of action should be joined, and even if the several suits embrace such causes of action as should have been brought in one, still the matter is addressed to the discretion of the court as to whether the causes shall be consolidated and the costs adjudged against the plaintiff. Some of the most important cases construing this statute are cited in the notes below.¹⁵

This subject is necessarily closely connected with questions arising as to the joinder, nonjoinder, and misjoinder of parties, and many of the rules announced and reasons given in the chapter on those subjects are applicable here.

¹⁴ Rev. Stats. 1895, art. 1431.

¹⁵ Paul v. Langdon, 60 Texas, 555; Young v. Gray, 65 Texas, 59; Mills v. Paul, 30 S. W., 242; Raymond v. Cook, 31 Texas, 373; Screwman's Ben. Assn. v. Smith, 70 Texas, 168, 7 S. W., 793; Texas Mex. Ry. Co. v. Cahill, 23 S. W., 232; Johnson v. Luling Mfg. Co., 24 S. W., 996; Davis v. Dallas Natl. Bank, 7 Texas Civ. App., 41, 26 S. W., 242; Dreben v. Russeau, 26 S. W., 867; Green v. Banks, 24 Texas, 508; Spencer v. James, 21 S. W., 540.

CHAPTER VIII.

PARTIES TO ACTIONS—WHO MAY SUE AND WHO BE SUED.

PERSONS REPRESENTING THE SOVEREIGN.

The law recognizes a difference between persons acting in their private capacity and those acting for or representing the sovereign. There are two kinds of the latter class,—first, artificial persons, and second, natural persons acting in an official capacity. Considering these in their order, we find that in our State government the artificial persons representing sovereignty are the State taken in its aggregate and corporate capacity, counties, cities, and towns.

The State as a Party Plaintiff.

The State as a party plaintiff has the same rights that any private person has, and may bring and maintain suits in the courts, and may enforce its rights against persons violating them in the same way, and to the same extent, that individuals may. This is the substance of the decisions as they are usually expressed.¹

In some respects, however, the privileges of the State as a plaintiff are greater than those of an individual, as it is not required to comply with equitable rules as to tender or payment in order to rescind a contract for fraud.²

State as Defendant.

When, on the other hand, the question to be determined is the State's liability to be sued, very different principles are applied from those which, under the same circumstances, govern in suits against individuals. It is an invariable rule that the sovereign can not be sued without its own consent. It is conclusively presumed that the State will respect the rights of individuals and redress all grievances that it

¹ State v. Kroner, 2 Texas, 492; State v. Delesdenier, 7 Texas, 95; State v. Purcell, 16 Texas, 309; State v. Thompson, 64 Texas, 692; State v. Loan and Trust Co., 81 Texas, 530, 17 S. W., 60.

² State v. Snyder, 66 Texas, 698, 18 S. W., 106.

may inflect upon them. If the existence of such grievance is shown to the satisfaction of the Legislature, that body will usually furnish appropriate direct redress; if, however, the validity of the claim is not fully proved, the usual method is to accord the claimant the privilege of suing the State in the proper court and establishing his rights by a judgment. In such cases the court exercises only the functions of hearing and adjudging; it has no power to execute or enforce its judgments, but the justice and propriety of the claim being thus established the State will pay it through its proper officers.³

This immunity from suit goes so far as to prevent cross-actions against the State, in suits brought in its behalf, either under general authority or by special law; and, as above seen, it also relieves the State from the necessity of making tender or payment in suits to rescind contracts, and in other actions in which under general equity rules a private individual would be required to do so.⁴

Counties.

The county may always sue as plaintiff when its rights are invaded. As the county is a minor political subdivision of the State, it does not enjoy so great immunity from suit as the State itself. It may always be sued for the breach of a contract which it was authorized to enter into. The only requirement in such cases, in addition to those with reference to suits against private persons, is that the claim must be presented to the county commissioners court and a demand for payment made before the suit can be brought.⁵ There are very few torts for which a county is responsible, but in all instances in which liability exists, suit may be brought against the county. If the claim is for damages, it should be first presented to the commissioners court. If it is not for money, the necessity for presentation seems to be open. Claims against a portion of an old county which has been cut off from it and made part of a new county, for its share of the old indebtedness of the parent county, need not be presented to the commissioners court of the new county before suit against the latter may be brought.⁶

³ Board of Land Coms. v. Walling, Dallam, 524; League v. De Young, 2 Texas, 500; Marshall v. Clarke, 22 Texas, 32; Rose v. Governor, 24 Texas, 504; Texas Mex. Cent. Ry. v. Jarvis, 80 Texas, 463, 15 S. W., 1089.

⁴ Snyder v. State, *supra*.

⁵ Rev. Stats. 1895, art. 790; Hohman v. Comal Co., 34 Texas, 38; Leach v. Wilson Co., 62 Texas, 331; Norwood v. Gonzales Co., 79 Texas, 222, 14 S. W., 1057.

⁶ Mills Co. v. Lampasas Co., 90 Texas, 603, 40 S. W., 403; Presidio Co. v. Jeff Davis Co., 35 S. W., 177, 13 Texas Civ. App., 115.

Cities and Towns.

There are no restrictions on the rights of cities and towns to sue; and, on the other hand, in all cases in which the law recognizes liability upon them, they may be sued just as private persons, without presentation of the claim or any preliminary steps toward adjustment.

In Whose Name Suit Must be Brought.

A state, county, and city should each sue and be sued in its proper name. It is also proper and usual, for convenience in conducting the litigation, to give the name of one of the officers upon whom citation and notice may be served.⁷

The above is the general rule, but if the suit is on an obligation made for the benefit of the county or city but payable in terms to some one else named therein, the suit may be brought in his name for the use of the county or city, as the case may be. In such cases the better practice is to sue in the name of the county or city, setting up the facts showing it to be the real party in interest. In cases of suit not on a written obligation naming the plaintiff as obligee, a suit brought in the name of one of the officers of the county or city would be abated on proper plea, but the defect can not be noticed otherwise.⁸

The Federal Government Party.

The Federal government of the United States is sovereign within its sphere of action, and can not be sued except by its own consent. Congress, however, has been very liberal in this regard and has passed many laws authorizing different kinds of suits against the government to be brought in various Federal courts; but, as none of these acts give jurisdiction to State courts, they do not give any right to sue the Federal government in nor affect its status before such tribunals, and hence have no direct connection with our present topic.

Natural Persons Representing the Sovereign.

Besides the several legal entities just enumerated, there are numerous natural persons who act for the sovereign and whose conduct in such rep-

⁷ Rev. Stats., arts. 1196, 1220-1221.

⁸ *Smith v. Moseley*, 74 Texas, 631, 12 S. W., 748; *Smith v. Wingate*, 61 Texas, 54.

representative capacity may have very great effect upon the rights and interests of individuals. It is often difficult to distinguish between the conduct of such persons in which they really represent and stand for the public, and acts done under authority assumed by them, but not covered by their commissions. So long as an officer acts strictly within the scope of his legitimate powers, neither he nor the government is subject to suit for his conduct. If, however, an act be clearly beyond his lawful authority, he is liable. This is true whether the act done is unlawful because the government had no power to order it done, or whether the act is itself within the authority of the government but is unlawful in the officer because the government had not authorized him to perform it, or whether the act is unlawful because the officer, in attempting to perform an act authorized and legal in itself, mistakes the person or thing upon which he should act. In any case, if the act is entirely beyond the officer's authority, it will render him liable to any one directly injured by it.

One of the most interesting cases asserting liability of officers for acts done beyond the power of the government is *The United States v. Lee*.⁹ There had been an effort made to sell the lands in controversy under a tax sale and the United States government had bought the property. Possession had been taken and by authority of the President the premises were being held and applied to a public purpose. No compensation had been made to the owner. The opinion of the court is too long to be quoted in full. That portion of it asserting the right of the individual to sue the representative, or supposed representative, of the government for his wrongful act, done under the semblance of authority but without real sanction of the law, is as follows: "The objection is also inconsistent with the principle involved in the two last clauses of article 5 of the amendments to the Constitution of the United States, whose language is: 'That no person * * * shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation.'

"Conceding that the property in controversy in this case is devoted to a proper public use, and that this has been done by those having authority to establish a cemetery and a fort, the verdict of the jury finds that it is and was the private property of the plaintiff, and was taken without any process of law and without any compensation. Undoubtedly these provisions of the Constitution are of that character which it is intended the courts shall enforce, when cases involving their operation and effect are brought before them. The instances in which the life and liberty of the citizen have been protected by the judicial writ of *habeas corpus* are too familiar to need citation, and many of these cases,

⁹ 106 U. S., 196.

indeed almost all of them, are those in which the life or liberty was invaded by persons assuming to act under the authority of the government. *Ex Parte Milligan*, 4 Wall., 2.

"If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law, and devoted to public use without just compensation?

"Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense can not be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought into collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Mr. Chief Justice Marshall says, to examine whether his authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

"But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?

"In the case supposed, the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit, and a cause of action cognizable in the court,—a *case* within the meaning of that term, as employed in the Constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration.

"What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery.

"It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defense stands here solely upon the immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive anyone of life, liberty or property without due process of law, or to take private property without just compensation. .

"These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground as they regard his liberty and his property. It can not be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that Constitution. As we have already said, the writ of *habeas corpus* has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the executive and the legislative branches of the government. See *Ex Parte Milligan*, 4 Wall., 2; *Kilbourn v. Thompson*, 103 U. S., 168.

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

"It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

"Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon the rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class.

"Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases statutes, which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts can not give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

"It can not be then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, 'Stop here; I hold by order of the President,' and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, though one of the three great branches of the government to which by the Constitution this duty has been assigned has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment, by the production of an order of the secretary of war, which that officer had no more authority to make than the humblest private citizen."

This case has been followed by the Supreme Court of Texas in the case of *Stanley v. Schwalby*,¹⁰ and though this case was reversed by the Supreme Court of the United States upon other grounds, this point was sustained. We may therefore regard it as established, that if the government itself has, under the Constitution, no power to do the act in question, it could not authorize an individual to perform it. It is immaterial who attempts to confer the supposed authority, or how regularly he may have acted in attempting to do so. The government can not give that which it does not have. In such case the individual may always be sued, for he is not, in legal contemplation at least, the representative of the sovereign.

An illustration of an attempt to exercise power of such a nature as might be delegated by the government, by one to whom no such delegation has been made, is found in the case of an officer making an arrest upon a forged warrant. The government has the power to issue a warrant of arrest in a proper case, but in the case supposed has not exercised it, but some one, fraudulently assumes to act in the name of the government and prepares a paper having the exact appearance and semblance of a warrant. It comes to the officer to whom it is directed, and he in good faith believes it to be genuine. If he arrests the party, he is subject to suit—his good faith being no protection against liability for actual damage.

Illustrations of the improper exercise of authority lawfully conferred are found in those cases in which an officer has genuine process authorizing the arrest of one person, and acting thereon he arrests another. Here the authority to arrest the party indicated in the warrant is real, but the officer misunderstands his authority, and attempts to exercise it by arresting the wrong individual. He is liable.

¹⁰ 85 Texas, 349, 19 S. W., 264.

OFFICERS IN DIFFERENT DEPARTMENTS OF GOVERNMENT.

There is no difference between the different departments of government as to immunity for acts done in the proper exercise of legitimate authority.

There is, however, material difference between them as regards liability for damages for acts done under the guise of official authority but not in fact properly covered thereby. These differences are dependent mainly on the differences in the nature of duties of the officers of the several departments; some of them being ministerial merely, others involving official discretion. Care must be taken to distinguish between these. The difference does not, as is often said, consist merely in the fact that one requires discretion and the other does not, for often acts purely ministerial require the exercise of judgment by the officer, but the difference lies in the personal character of the discretion to be exercised in the one case and its official character in the other. To illustrate: a sheriff is a ministerial officer, a writ of execution is placed in his hands, and he is thereby required to levy upon any property belonging to the defendant in the writ, which may be subject to execution. Certain property is pointed out to him as meeting these conditions. He must of necessity exercise his judgment and discretion in determining these questions. He may investigate the matter, talk to persons who claim to know the facts, and at length conclude that the property belongs to the defendant, and make the levy. Here as a necessary preliminary to the discharge of his official duty, he has passed on the questions of ownership and exemption, but he did so for his own guidance and not as an agent of the government authorized to bind other parties by the conclusion at which he arrived. A third party claims the property and gives the bond required by statute and the trial of the right of property comes on before the proper court. Here the identical questions as to ownership that arose in the mind of the sheriff when he made the levy and were investigated by him are to be considered. But in this instance the officer by whom they are to be heard and determined is the agent of the government for settling the dispute and binding the parties. The judgment and discretion exercised by the sheriff was personal and not official, and his action ministerial; the judgment and discretion exercised by the judge is official and representative, and his act is not ministerial.

If the act is ministerial, that is involves no discretion in a representative capacity the almost universal rule is that the officer is subject to control in the performance of the act and is liable for damages for its nonperformance or for mistakes committed in the effort to perform.

If the act involves official discretion, the general rule is that the officer is immune both from control in the doing of the act and from liability for the manner of its doing; he may, however, be compelled to act in some way in the matter.

As almost all official acts of legislative and judicial officers involve official discretion, they are rarely held responsible; as most of the acts of executive officers are ministerial merely, these officers are usually liable for improper discharge of their duties.

It will be convenient to consider the question as to the different classes of officers separately.

Legislative Officers.

The almost invariable rule is that legislative officers are free from control in the discharge of their duties while such duties are being performed, and are not liable for damages resulting therefrom. In a few extreme cases the courts look upon some particular duty devolving on a member of the legislative department as purely ministerial and undertake to compel performance, but such cases are rare and of very doubtful propriety.¹¹

Executive Officers.

The Governor of the State is exempt from suit on account of any official act performed by him.¹²

The heads of departments are exempt from control by *mandamus* except from the Supreme Court.¹³

All these officers, however, except the Governor are subject to injunction to prevent their doing unlawful and injurious acts under the claim of official authority.¹⁴

Subordinate executive officers are always subject to the control in the discharge of purely ministerial duties, and are also responsible for damages resulting from unlawful acts done under color of authority.¹⁵

¹¹ State v. Bolte, 52 S. W., 262, and cases cited in the opinion.

¹² Rev. Stats. 1895, art. 946.

¹³ Rev. Stats. 1895, arts. 946 and 4861.

¹⁴ Kaufman Co. v. McGaughey, 3 Texas Civ. App., 669, 21 S. W., 261.

¹⁵ Arberry v. Beavers, 6 Texas, 457; Teat v. McGaughey, 85 Texas, 485, 22 S. W., 302; Winder v. Williams, 23 Texas, 601; Railway Co. v. Locke, 63 Texas, 623; Fuller v. Sparks, 39 Texas, 137; Schmick v. Noel, 72 Texas, 3, 8 S. W., 83; Mechem on Public Officers, chap. 6.

Judicial Officers.

The line between liability and non-liability of judicial officers for damages for acts done by them in the assumed exercise of official functions not in fact pertaining to them is not clearly drawn. If the court really has jurisdiction of the matter, it is universally agreed that no liability attaches to the judge, however erroneous, or even malicious, his conduct may be.¹⁶ On the other hand, if the matter is such as admits no doubt of its being entirely beyond the jurisdiction of the court, he would be responsible for injuries resulting from his action, just as if he had not attempted to clothe it with official authority.¹⁷ These extreme cases are clear, but those lying between them, in which there is doubt regarding the question of jurisdiction, present many difficulties. The authorities on the point are not harmonious and it is difficult to arrive at any rule which will satisfy them all. The correct doctrine seems to be, that if the question of jurisdiction is such that a reasonable man, fairly well qualified to hold the office the powers of which are under consideration, might in good faith conclude that the jurisdiction existed, then no liability attaches, even though in the particular case the officer may have acted improperly and from evil motives. But if the question is such that a person so qualified would not conclude in favor of the jurisdiction (even though it could not be said to be quite free from doubt), then the officer is protected only in case he erred honestly and with good motive. In such cases his motives will always be presumed to be good, and to fix liability the person injured must offer satisfactory proof of evil intention—or of gross carelessness equivalent to evil intention.

There are some acts devolving on judicial officers which are practically ministerial. The performance of these can be compelled by *mandamus*.^{17a}

In cases involving judicial discretion, but in which the duty to proceed with the matter is plain and imperative, a judicial officer can be compelled to go on in the discharge of the duty, but the manner of its discharge must be left to him.¹⁸

¹⁶ *Raines v. Simpson*, 50 Texas, 497; *Anderson v. Roberts*, 35 S. W., 416; *Bradley v. Fisher*, 13 Wall., 335; *Cooley on Torts*, 2 ed., 477.

¹⁷ *McVea v. Walker*, 11 Texas Civ. App., 46, 31 S. W., 839.

^{17a} *Ewing v. Cohen*, 63 Texas, 483; *Caldwell v. Harbart*, 68 Texas, 322, 4 S. W., 607; *Brown v. Ruse*, 69 Texas, 589, 7 S. W., 489; *Osborne v. Prather*, 83 Texas, 211, 18 S. W., 613; *Yeiser v. Burdett*, 10 Texas Civ. App., 155, 29 S. W., 912; *Schintz v. Morris*, 13 Texas Civ. App., 580, 35 S. W., 516, and 36 S. W., 292.

¹⁸ *Land Commissioner v. Bell*, Dall., 366; *Lloyd v. Brinck*, 35 Texas, 9; *Arberry v. Beavers*, 6 Texas, 464; *Callaghan v. Sallaway*, 5 Texas Civ. App., 239, 23 S. W., 837.

PERSONS IN THEIR PRIVATE CAPACITIES.

By far the larger number of legal relations and obligations exist between persons in their private capacities, and consequently much the larger share of litigation is between private persons. We find here also the two classes of natural and artificial persons, and while the rules regarding them are generally the same, there are a few important differences relating principally to questions of citizenship and rights guaranteed under the Federal Constitution. These will be considered as we proceed with the discussion of the several classes of persons who may be parties to suits.

It will be convenient to make several different classifications of these persons in order to understand all the legal rules involved. The first of these will be based on political allegiance or citizenship. On this basis they are divided into citizens of the State of Texas, citizens of other States, alien friends, and alien enemies. Each of these must then be again divided into residents of the State and nonresidents, but these will be considered in making each of the above classes without any more general subdivisions of the subject.

Citizens of Texas.

As the primary object of government is to protect the rights of its citizens, and as the courts are the instrumentalities through which this protection is afforded, it follows that each and every citizen of the State in which the court is held is entitled to sue as a party plaintiff, and is subject to be sued as a party defendant, unless there exists some special circumstances constituting an exception. It is not ordinarily incumbent upon the plaintiff to allege facts constituting capacity in himself or the defendant, but exceptional circumstances constituting incapacity on the part of either must be called to the court's attention by the party seeking advantage therefrom, or they can not be considered. What circumstances constitute these several incapacities, and the consequences of each, are considered hereafter under their appropriate heads.

Citizens of Other States.

The Constitution of the United States guarantees to the citizens of each State the enjoyment of the same rights and privileges in every other State of the United States as are enjoyed in such State by its own

citizens.¹⁹ It must be observed that this is a guarantee of privilege and not a subjection to control; it gives to the citizens of every State in the Union the same right to become parties plaintiff in the courts of each State that the citizens of that State have, but it does not subject them personally to the jurisdiction of these courts as defendants. This constitutional provision does not, however, secure to the citizens of other States any greater privileges in a State than its own citizens enjoy; and therefore no State can be compelled to create tribunals to litigate the rights of citizens of other States. When, however, it does provide a tribunal to litigate in behalf of its own citizens, such tribunals must be open to the citizens of the other States of the Union for the same purposes, to the same extent, and upon substantially the same conditions that they are open to the citizens of that State.

Alien Friends.

As to alien friends, doctrines of comity apply; and it is a rule of practically universal recognition that the courts of every State are as open to the citizens of every friendly nation—whether resident or nonresident in the State in which the court exists—for purposes of bringing suit, as they are to the citizens of the State.

Alien Enemies.

Citizens of foreign nations with which the United States government is at war are not *legally* entitled to bring suit in the courts of the State of Texas, and the rule is usually stated that they *can not* do so.

The tendency of modern authorities is to relax the rigor of this rule so far as it may be necessary to prevent actual or violent disturbance of either the person or property of the alien enemy; and hence, while the strict letter of the law seems to deny him redress in all civil cases, yet we think that the courts would recognize his property rights to the extent of protecting them from force or violence. It is perfectly clear that so long as he is permitted to remain in the State and is a noncombatant, his person is within the protection of the criminal law. An alien enemy within the limits of the State is always subject to be sued if service can be had on him; and when he is sued he is permitted to make every defense in the case that a citizen could.²⁰

¹⁹ Const. U. S., art. IV, sec. 2, par. 1.

²⁰ McVeigh v. United States, 11 Wall., 259; Masterson v. Howard, 18 Wall., 99.

LEGAL STATUS.

The second classification will be made with reference to the legal status of parties. As to this they may be divided into two general classes,—persons *sui juris*, and persons *non sui juris*.

There are disqualifications which attach to the person as such and apply to him in all litigation without regard to the particular matter involved in the suit; there are others which do not attach to the person as such, but grow out of some special conditions or circumstances connected with the particular matters involved. The first general personal disqualifications are matters of legal status, and a person subject to any one of them is not regarded as *sui juris*; the second are not matters of legal status, but are mere exceptional limitations on the person's legal capacity to represent himself in the assertion of particular rights.

Persons Sui Juris.

This class embraces all persons not subject to any continuing disabilities in law or in fact. All persons are presumed to be *sui juris* until the contrary appears, hence the rule is that each person may sue or be sued in his own name and right as to matters in which he is interested, unless the special facts are shown which disqualify him from so doing. Among the most important of the special conditions which affect the right to sue are those which peremptorily withdraw property from the possession of the real owner and place it in the custody of some other person for some special purpose, such as an assignment for the benefit of creditors, existence of trust estates of different kinds, administration of estates, etc., when any of these conditions exist the parties really interested in the estates or property are as a rule precluded from individually asserting their rights, but are required to sue and be sued through or in connection with the representatives of the fund or estate.

Assignment for the Benefit of Creditors.

An assignee for the benefit of creditors under the statute is authorized to conduct all litigation necessary to reduce to possession, hold, and preserve the property assigned, or to collect and realize upon all choses in action. He holds the legal title to the property for the purposes of the assignment, and is legally entitled to its custody and control for that purpose, subject to the orders of the court having jurisdiction. All actions against the estate must be brought against him, and

the assignee should not be joined. Action against the assignee for mismanagement or for any failure of duty as assignee must be brought against him in the court where the assignment is pending. The plaintiff in these suits should be the parties aggrieved by the conduct complained of; usually they are the creditors of the assignor whose rights are jeopardized. All such parties may join in the suit, or a part may sue for the benefit of all. The same general doctrines obtain as to common law assignments, except that in them no particular court has charge of the estate, and suits regarding its management must be brought in the court having jurisdiction and venue under ordinary conditions and rules.²¹

Trustees and Beneficiaries.

The kinds of trusts that may exist and the means by which they may be created are exceedingly numerous and it is impossible to formulate rules to apply alike to all of them. So far as the question of parties is involved, the general rule is that in all litigation involving a trust estate, both the trustee and the beneficiaries should be made parties. This rule applies whether the subject matter of the trust be real estate, tangible personal property, or choses in action.²² There are, however, several exceptions. The first is in those cases in which by the terms of the trust the power to litigate regarding it is expressly conferred upon the trustee. Where the trust is created by a contract which confers such power it is binding so long as the trustee acts in good faith, and does nothing to forfeit his rights under the agreement.²³ When the trust is created by law or the express orders of a court, and such power is given, it is binding subject to same limitations.

Another exception occurs where the beneficiaries are so numerous as to make it inconvenient and impracticable to combine them as parties. In such a case litigation should be conducted by or against the trustee.²⁴

The same case often comes within both these exceptions, as where the beneficiaries are very numerous and the instrument creating the trust expressly provides that the trustee may proceed in his own name. Such conditions nearly always exist with reference to railway mortgages and bonds secured thereby. Another exception to the rule re-

²¹ Thomas v. Chapman, 62 Texas, 197; Windham v. Patty, 62 Texas, 494; Moody v. Carrol, 71 Texas, 147, 8 S. W., 510; Preston v. Carter, 80 Texas, 391, 16 S. W., 17.

²² Hall v. Harris, 11 Texas, 300; Smith v. Ryan, 20 Texas, 664; Ebell v. Bursinger, 70 Texas, 122, 8 S. W., 77.

²³ Monday v. Vance, 11 Texas Civ. App., 374, 32 S. W., 559.

²⁴ Shaw v. Railway Co., 71 Mass., 162; Tunstall v. Wormley, 54 Texas, 476.

quiring the beneficiary to be joined is in pledge of choses in action as collateral security. Ordinarily there are express terms in the contract fixing the rights of the pledgee. In the absence of such terms he may sue in his own name and collect the debt.²⁵

Executors.

There are two classes of executors recognized by our laws: first, those who administer estates, in conformity with the will, under the direction and control of the probate court; second, those in whose favor the will provides that no supervision shall be exercised over them by the court. The latter are usually called independent executors.

Executors of either class are authorized to conduct litigation with regard to the estate which they are administering either as plaintiffs or defendants, without the necessity of joining the devisees and legatees. Such suits will bind all parties interested in the estate to the same extent as if conducted by the deceased during his lifetime, except that judgments therein may, of course, be set aside by any person interested if fraud or collusion on the part of the executor be established. The rule stated above as to parties applies in all suits brought by executors and all against the estate, except those involving title to real estate; in which cases the heirs must be joined as parties. In other words, the executor may bind the estate in suits of all kinds brought by him in his fiduciary capacity, and in suits of all kinds except those involving the title to real estate brought against him in such capacity. In the latter class of suits the heirs of the deceased must be made parties.²⁶ An administrator or executor of an estate acting under the direction of the probate court can not be sued on any liquidated demand founded upon contract until the claim has been presented to him and rejected.²⁷ Unliquidated claims need not be first presented for approval.²⁸ Independent executors may sue without any special authority, and may be sued without the claim having been presented to him.²⁹

Administrators.

Where there is no will and the estate is in the charge of the probate court, litigation concerning it must be conducted by and against the administrator, except, as in the case of executors in suits against

²⁵ *Huyler v. Dahoney*, 48 Texas, 239; *Daniels on Neg. Inst.*, sec. 833.

²⁶ *Rev. Stats.* 1895, arts. 1197, 1198.

²⁷ *Rev. Stats.* 1895, art. 2082; *Danzey v. Swinney*, 7 Texas, 626; *Duty v. Graham*, 12 Texas, 437; *Western Mortgage Co. v. Jackman*, 77 Texas, 622, 14 S. W., 305.

²⁸ *Sutton v. Page*, 4 Texas, 142; *King v. Cassidy*, 36 Texas, 538.

²⁹ *Callaghan v. Grenet*, 66 Texas, 238, 18 S. W., 507.

the estate involving the title to land, where the administrator and the heirs must both be joined.³⁰

Upon the death or insanity of either the husband or the wife, the survivor may administer the community estate by filing an inventory and giving a bond as required by statute. Such an administration is largely independent of the probate court, and the administrator may sue or be sued without authority from that court.³¹

Persons Non Sui Juris.

Married Women.

The first class of persons to be considered under this head are married women. While, as to her substantive rights, the married woman has much greater privileges in this State than she had at common law, the same enlargement has not been made in matters of procedure. In almost all litigation she should be represented by her husband.³² While she is interested with him in all community property, she is rarely, if ever, a necessary party;³³ and only in a very few instances is she a proper party in suits with reference to it. The husband is a necessary party to all suits against the wife.³⁴ She is usually a proper, but rarely a necessary, party to suits involving her separate estate, since the right of possession, management, and control of such property is vested in the husband, and the right to litigate regarding it is, in almost all instances, recognized as being in him. Appropriate allegations must be made showing that the subject matter of the suit is the separate property of the wife, but with such allegation he may maintain the suit in his own name as husband.³⁵

It is better practice not to join the wife in suits involving the title or damages to her separate estate, though she is a permissible party. She becomes a necessary party when her interests are adverse to those of her husband, and must then be joined.³⁶ In suits for personal in-

³⁰ Rev. Stats. 1895, arts 1197, 1198.

³¹ Rev. Stats. 1895, arts. 2219-2221, 2236-2236a.

³² Rev. Stats. 1895, arts. 1200, 1201, 1202.

³³ San Antonio St. Ry. Co. v. Helm., 64 Texas, 149; Walling v. Hannig, 73 Texas, 581, 11 S. W., 547; Edrington v. Newman, 57 Texas, 634.

³⁴ Carothers v. McNeese, 43 Texas, 223; Roundtree v. Thomas, 32 Texas, 286.

³⁵ Rev. Stats. 1895, art. 2851; Taylor v. Murphy, 50 Texas, 291; Houston v. Schrimpf, 31 Texas, 669; Leach v. Millard, 9 Texas, 552.

³⁶ San Antonio St. Ry. Co. v. Helm, 64 Texas, 149; Texas Pac. Ry. Co. v. Medaris, 64 Texas, 93; Lee v. Turner, 71 Texas, 265, 9 S. W., 149; Wafford v. Unger, 55 Texas, 484; Edrington v. Newland, 57 Texas, 634.

juries sustained by the wife during coverture she is a permissible but not necessary party.³⁷

If the wife's property or interest is being injured or jeopardized and the husband declines to sue, she may proceed in her own name, but must allege the fact of her husband's unwillingness to join.³⁸ For debts contracted by the husband or wife during coverture and for which their community estate, or the separate property of the husband is sought to be held liable, the husband alone is a proper party. If it is claimed that the wife's separate estate is liable, she must be joined, whether the suit be based upon an antenuptial debt of the wife or on a contract made by her after coverture on which she is sought to be held personally liable.³⁹

Infants.

All persons under twenty-one years of age except married women and widows are infants. Infants can neither sue nor be sued in their own persons. If they have a regular guardian, the suit must be prosecuted or defended by him; if they have no regular guardian, the suit must be brought by their next friend or defended by their guardian *ad litem*.⁴⁰

Persons Insane or Otherwise Incompetent.

If one has been adjudged idiotic, insane, or an habitual drunkard, and a guardian has been appointed for his estate, he can litigate only through such guardian.⁴¹

A person insane or idiotic in fact, but who has not been so adjudged and who has no guardian, may sue through a next friend, and may defend, when sued, through a guardian *ad litem*.⁴²

COMBINATIONS OF NATURAL PERSONS.

The business interests of men often require that they should combine their energy, skill, and capital in the prosecution of enterprises. The law has different methods of dealing with these combinations ac-

³⁷ *Railway Co. v. Burnett*, 61 Texas, 638; *Gallagher v. Bowie*, 66 Texas, 266, 17 S. W., 407.

³⁸ *McIntire v. Chappel*, 2 Texas, 379; *Edwards v. Dismukes*, 53 Texas, 612.

³⁹ Rev. Stats. 1895, arts. 1201, 1202.

⁴⁰ Rev. Stats. 1895, art. 1211.

⁴¹ Rev. Stats. 1895, title 51, chap. 15.

⁴² *Abrahams v. Vollbaum*, 54 Texas, 226; Rev. Stats. 1895, art. 1211.

cording to their circumstances. In some instances, it recognizes the combination as so complete as to result in the merger—so far as that enterprise is concerned—of the individuals into a new legal entity; in others it recognizes it only so far as to make each of such persons and also the combination legally responsible for the conduct of each of the members of the combination, within the legitimate scope of such enterprise; and in still others it does not go even to this extent. These differences in substantive law and right are recognized in the law of procedure and materially affect the question of parties to suits.

Partnerships.

Partnerships are not recognized by law, either common or Texas statutory, as constituting separate and distinct legal entities, and therefore the right to sue or to be sued in the partnership name is not conceded to them in our courts; and litigation by or against partnerships must be conducted in the names of the individual members of the firm and not in the firm name.

The usual and proper method is to give the names of the individuals and their residences, and then to follow with a statement of the fact that they compose a firm of the designated name, and sue, or are sued, as members of such firm.⁴³ The rule requires the joinder of all the members of the firm, but an exception is permitted in the case of dormant partners, that is, persons whose names do not appear in the firm name, who take no open part in the business, and who are not known to the adverse party to be partners. Formerly this relaxation of the rule existed only in behalf of parties suing the firm, on the theory that it was not just to deny to the plaintiff the right to sue persons who were known to be under legal obligation to him, because he was not able to name others connected with them in the business and who consequently were liable to suit.⁴⁴ It has since been extended to cases in which the firm is plaintiff, though the reason of the rule can not be said to apply.⁴⁵ After the death of one or more members, the surviving partners may sue or be sued regarding firm matters without the necessity of joining the heirs or representatives of the deceased members.⁴⁶

⁴³ Frank v. Tatum, 87 Texas, 204, 25 S. W., 409; Tynburg v. Cohen, 67 Texas, 222, 2 S. W., 734; Kirbs v. Provine, 78 Texas, 353, 14 S. W., 849.

⁴⁴ Speake v. Prewitt, 6 Texas, 252.

⁴⁵ Keesey v. Old, 3 Texas Civ. App., 1, 21 S. W., 693; Boehm v. Calesch, 3 S. W., 293.

⁴⁶ Jackson v. Alexander, 8 Texas, 109; Watson v. Miller, 55 Texas, 290; Dunman v. Coleman, 59 Texas, 199; Fulton v. Thompson, 18 Texas, 278.

The rule that all members of the firm must sue or be sued does not apply to limited partnerships; but it does apply to joint stock companies.

Charitable, social, and religious organizations which are unincorporated are not regarded as partnerships, and causes of action growing out of wrongs and injuries to or by them are recognized as existing in favor of or against only those persons who, as members thereof, participated in the transactions out of which the causes of action grow, and in suits on such causes of action such members, and they only, need be parties.⁴⁷

Private Corporations.

Private corporations are recognized by the law as having legal existence separate and distinct from the members composing them, and can sue and be sued in their corporate capacity and name, without the necessity of naming or joining the stockholders. The usual method is to bring the suit for or against the corporation by name, mentioning the name and residence of one or more of its officers or agents through whom it may be served with process.

While corporations are recognized as artificial persons, having for the purpose of venue and territorial jurisdiction in the Federal courts residence and citizenship in the State by which they are created,⁴⁸ they are not regarded as citizens within the clause of the Constitution which guarantees to the citizens of each State equal rights in every other State with the citizens of the latter,—consequently no State is under any compulsion from the Federal Constitution to furnish courts to adjudicate the rights of corporations created in other States, nor to allow such corporations the privilege of suing in its courts, by reason of any guarantee contained in that clause of the Constitution. And unless some other basis for demanding recognition can be found in the particular case the corporation must abide the State regulations.⁴⁹

The Interstate Commerce clause in the Federal Constitution, however, does apply to and include corporations; and wherever the right involved is such an one as can be claimed under that clause it can not be abridged by the State government. It has been frequently decided that States

⁴⁷ Mech. on Part., sec. 7.

⁴⁸ *Railway Co. v. Harris*, 12 Wall., 60; *Louisville, etc., Ry. Co. v. Letson*, 2 How., 497; *Marshall v. Railway Co.*, 16 How., 314.

⁴⁹ *Paul v. Virginia*, 8 Wall., 168; *Norfolk & W. A. Co. v. Pennsylvania*, 136 U. S., 114, 10 Sup. Ct. Rep., 958; *Pembina, etc., Co. v. Pennsylvania*, 125 U. S., 181, 8 Sup. Ct. Rep., 737; *Weston Paper Bag Co. v. Johnson*, 38 S. W., 364; *Taber v. Interstate B. & L. Assn.*, 91 Texas, 92, 40 S. W., 954.

can not make prohibitory laws or laws compelling the payment of taxes or license fees by foreign corporations engaged in interstate commerce as conditions precedent to their doing business within their borders,⁵⁰ nor can they make the right to do such business depend on the surrender by the corporation of its privilege of suing in the Federal courts, or of removing into the Federal courts suits which may be brought against it in the State courts.⁵¹

There are a number of Texas cases sustaining the validity of the present Texas statute requiring payment of tax and procuring of a license before suit can be maintained in the State courts,⁵² except in cases arising in the transaction of interstate commerce.⁵³

If, however, the transaction out of which the suit grows took place at a time and place when and where it was not a violation of the statute the corporation may bring suit on it without having paid the tax and gotten the permit.⁵⁴

The statute does not apply to contracts arising in interstate or international commerce which are exclusively within the jurisdiction of the Federal government.⁵⁵

In cases in which the statute applies, compliance with the law is a condition precedent to right to sue and must be plead and proved. Failure to plead may be taken advantage of by demurrer, and failure to prove, after being plead is available as a defense on the merits, thus disregarding the ordinary rule as to disability of the plaintiff.⁵⁶

CAPACITY IN WHICH SUIT MUST BE BROUGHT.

Parties to suits ordinarily sue or are sued in their individual or private capacity; but, as we have seen, there are numbers of persons occupying special relations towards others, or towards specific property, which require that litigation regarding the rights of such other persons or in such property should be conducted by them in some representative capacity, as trustee, executor, administrator, etc.

⁵⁰ *Cooper Mfg. Co. v. Ferguson*, 113 U. S., 727, 5 Sup. Ct. Rep., 739; *Bateman v. Milling Co.*, 1 Texas Civ. App., 90, 20 S. W., 931.

⁵¹ *Borren v. Burnside*, 121 U. S., 186; *Texas L. & M. Co. v. Worsham*, 76 Texas, 556, 13 S. W., 384.

⁵² Rev. Stats. 1895, art. 746.

⁵³ *Western Paper Bag Co. v. Johnson*, *supra*; *Taber v. Interstate B. & L. Assn.*, *supra*.

⁵⁴ *Whiteley v. General Electric Co.*, 45 S. W., 959; *Mansur & Tebbets Imp. Co. v. Beer*, 45 S. W., 972.

⁵⁵ *Railway Co. v. Davis*, 55 S. W., 562; *Pasteur Vaccine Co. v. Burkey*, 54 S. W., 804.

⁵⁶ *Western Paper Bag Co. v. Johnson*, *supra*.

The law, therefore, requires that whenever a person appears in court the capacity in which he stands at the bar should be made clear in order that the court and all interested parties may know whether he sues or is sued in his own right or as the representative of some other interests. The law presumes that every individual sues or is sued individually, unless the contrary affirmatively appears upon the face of the pleadings. It is therefore necessary, whenever one desires to bring himself or an adverse party before the court in any way except as an individual representing his own interests, that there be distinct, specific allegations to this effect, showing the special capacity in which he is before the court.

It has been adjudged that following the name of the plaintiff or defendant by such words as executor, administrator, guardian, trustee, etc., is not a compliance with this requirement, such terms being merely descriptive of the person and not indicating an intent to sue in the capacity to which the term applies. If a petition begins, "A B, Executor of C D, complaining of E F," the words "Executor of C D" are merely a description of A B, and the estate of C. D, its rights, and interests are not thereby brought before the court. If it is desired to bring the suit as executor, the allegation should be, "A B, duly appointed as executor of the estate of C D by the probate court of county, on the day of, suing as such Executor," or some equivalent language showing clearly that the suit is brought by him in his fiduciary capacity. This is equally true of persons against whom suits are brought. If they are to be sued in a fiduciary capacity, this must be made to appear affirmatively upon the face of the plaintiffs' petition, otherwise the suit will be regarded as brought against them individually.⁵⁷ The same is true of intervenors. The capacity in which they come before the court must be made to appear.

⁵⁷ Gayle v. Ennis, 1 Texas, 184; Hall v. Pearman, 20 Texas, 169.

CHAPTER IX.

PARTIES TO ACTIONS CONTINUED—JOINDER, NONJOIN- DER, AND MISJOINDER OF PARTIES.

Heretofore we have considered who may sue and be sued and in what capacity suits may be brought by them. The next matter requiring attention is the joining of different persons authorized to sue or to be sued as plaintiffs or as defendants in the same action. This subject is closely akin to joinder and misjoinder of causes of action discussed in a previous chapter, and many of the cases and part of the discussion of that topic are equally applicable here.

GENERAL PRINCIPLES.

No one is bound by the judgment of a court except those persons who, in legal contemplation, are parties to the suit, or who hold rights under such parties or in privity with them; or, as it is usually expressed, the judgment of a court is binding only on parties and privies. It follows that, in order for the litigation to be effective, it is necessary to have before the court all persons whose rights are either directly involved therein or sought to be directly affected thereby. It is very often the case in this State, where the joinder of causes of action is freely permitted, and where prayers for alternative relief are allowed, that numerous parties will have interests to a greater or less extent involved in the litigation, and that among these interests some will be more direct and important than others. In such a state of affairs it is but natural that words should be used with different meanings and some looseness of expression should occur.

CLASSIFICATION WITH REFERENCE TO CONNECTION WITH SUBJECT MATTER.

Classification of parties based on their connection with the matters involved in the litigation separates them into necessary, proper, and improper parties.

Necessary and Proper Parties.

There are at least two distinct senses in which the term necessary is applied to parties,—one, the strictest sense, including only those persons without whose presence before the court no adjudication of any of the subject matter involved in the litigation can be had; the other, embracing the persons just indicated and also such other persons as may be required to be before the court in order that one or more of the ancillary or subordinate purposes of the suit can be accomplished.

The clearest statement of the meaning of the term necessary parties which I have found is given by Mr. Pomeroy,¹ as follows: "In all equitable actions, a broad and most important distinction must be made between two classes of parties defendant; namely, (1) those who are 'necessary,' and (2) those who are 'proper.' ~~Necessary~~ parties, when the term is accurately used, are those without whom no decree at all can be effectively made determining the principal issues in the cause. Proper parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all the persons who have any interest in the subject matter of the litigation. Confusion has frequently arisen from a neglect by text writers, and even judges, to observe this plain distinction. Parties are sometimes spoken of as necessary when they are merely proper. Thus, because a decree can not be rendered which shall determine the rights of certain classes of individuals without making them defendants in the action, they are not unfrequently called necessary parties; or, in other words, because they must be joined as defendants in a particular suit, in order that the judgment therein may bind them, they are denominated 'necessary' parties absolutely. Such persons are 'necessary' *sub modo*—that is, they must be brought in if it is expected to conclude them by the decree; but to call them 'necessary' absolutely is to ignore the familiar and fundamental distinction between the two classes of parties which has just been mentioned. This inaccurate use of language would make every person a necessary party, who should actually be joined as a codefendant in an equitable action."

While this authority treats directly of practice in courts of equity, the same rules apply here, since the plaintiff is allowed to seek a number of remedies either in equity or under the Texas practice. Principal issues in a case are those absolutely essential to the maintenance of the suit stated by the plaintiff, and ancillary or subordinate issues are such as grow out of or are dependent upon the main issue, and which fail whenever that is determined adversely to the plaintiff, but which are

¹Pomeroy's Rem. and Rem. Rights, 2 ed., sec. 329.

not necessarily involved in the decision of the main issue in his behalf. This may be illustrated by a suit on a debt secured by a lien, in which the plaintiff desires to secure a personal judgment against the defendant for the debt and also a foreclosure of the lien against the property. He may establish his debt and get a judgment against the defendant, even though his proof should fail as to the lien; but if his proof as to the debt should fail, the lien being an incident to the debt, could not, of course, exist, and a decision against the plaintiff as to the debt would be conclusive as to the whole case. As the existence or nonexistence of the debt could not be adjudged against any one except the debtor, he would be a necessary party, in the strict use of that term, to any suit in which judgment against him for the debt was sought; but, if there were some other person having no connection with the debt, but having some right in the property upon which the lien rested, he would not be an absolutely necessary party to the suit to collect the money from the debtor. The principal issue, the existence of the debt, could be adjudged without him. If, however it was desired to bind him and affect his interests in the property by the judgment of foreclosure, he would in that point of view ordinarily be a necessary part. All authorities would agree in calling the debtor a necessary party to the litigation which sought personal judgment against him, while the person interested in the property would be spoken of as a necessary or as a proper party according to the point of view from which the matter was regarded. These principles apply to parties in all classes of litigation. We may therefore say, that in the eye of the law all those are necessary parties without whose presence the principal issue in the case could not be determined. All those are proper parties who are directly interested in the subject matter of litigation in any way, and these proper parties ordinarily become necessary if the purpose of the suit is to affect their interests in such subject matter. The interest of such persons may be in one or more of the three elements constituting subject matter, as that term has been previously defined,—that is, it may be in the rights sought to be enforced, in the wrongs sought to be redressed, or in the remedies sought to be obtained, including the issuance and execution of process employed to give effect to these remedies. Interests in the litigation may also result from some claim on the thing or *res* out of which grow the rights asserted in the suit, or with regard to which they exist, or upon which the alleged wrongs were perpetrated, or to which the desired means of redress will be applied. Every person having a direct and ascertainable interest in these matters which may be affected by the court's action in the suit is a proper party; and, if it is desired to bind him, is a necessary party to the suit.

Improper Parties.

Persons who have no such connection with or interest in the subject matter of the suit or the *res* out of which it grows as to make them necessary or proper parties can not rightfully be brought before the court in the case, and when this is attempted, the persons so unlawfully joining or joined are called improper parties.

The above classification is one made by the law, and exists without reference to the action taken by persons conducting the litigation in any particular case.

CLASSIFICATION BASED ON MANNER OF CONDUCTING THE LITIGATION.

Classification depending upon the manner of bringing and conducting the particular suit will now be considered. Here parties are divided into, first, those who are sought to be made parties, that is, all those who join in the suit as plaintiffs or are joined as defendants; second, those who have actually been made parties, by joining or being joined in the suit and by having been subjected to the active jurisdiction of the court; and third, those who have, in law and in fact, been made parties, that is, those who have been rightfully joined and who have been actually brought within the active jurisdiction of the court. The first of these classes includes those whom the parties litigant think ought to be before the court, but who may or may not, in any particular case, be identical with those regarded by the law as necessary or proper parties, as indicated above. Counsel may be mistaken as to who are necessary and proper parties, and may have failed to join some who should have been impleaded. This would be a case of nonjoinder. On the other hand, they may have joined some person as a necessary or a proper party whom the law does not regard in such a light. This would be a case of misjoinder. Both of these are errors that should be avoided. The second class, actual parties, includes all persons who have been in fact joined, whether properly or improperly, and who have actually been brought before the court. The third class, persons rightfully before the court, are those whom the law requires or permits to be sued and who have in fact been subjected to the active jurisdiction of the court in some lawful way. This would not include parties actually but unlawfully joined, nor those lawfully joined but not yet subjected to the active jurisdiction of the court. It is only between parties of this third class, that is, those who are rightfully before the court that litigation can be conducted. In proceedings *in personam*, a party to be bound, must be within the active jurisdiction of the court at the time the judgment is rendered. In proceedings *in rem*, as we have seen, all

persons are regarded as parties and no actual service is necessary. In proceedings *quasi in rem*, our Texas courts hold that the kind of service contemplated by the statute is necessary to give jurisdiction.²

Active jurisdiction may be acquired by the court in two ways,—first, by voluntary submission; and second, by compulsion.³

PLAINTIFFS, DEFENDANTS, INTERVENORS.

With reference to their position on the docket, parties are designated as plaintiffs, defendants, and intervenors.

The common law rule was that all plaintiffs must be adverse parties to all defendants; that is, all persons having a common or joint right were compelled to join in a suit against those who violated this right. Inconvenience very often arose from this rule, when parties thus interested declined or refused to join in the litigation. In a few instances, therefore, the law permitted those who desired to sue to use the names of those who did not so desire, by joining them as plaintiffs in the suit, indemnifying them at the same time against liability for costs, etc.⁴ This practice was allowed only in extreme cases to prevent a default of justice.

In equity the rule is different; the plaintiffs and defendants while usually adversely interested, are not necessarily so; and not infrequently persons who believe their rights to have been invaded are permitted to sue not only the wrongdoers, but also any other persons who may be interested with the plaintiffs, but who do not care to join in bringing the suit. The court will then, upon final hearing, make a decree adjusting the rights and interests of all parties, as the facts and equity seem to demand.

The parties against whom suit is brought are called defendants. As stated above, they are at common law almost invariably interested adversely to those suing them; but in equity they need not be so.

Any person who is not included among those originally suing or sued, but who has a direct and substantial interest in the subject matter of the suit and desires to make himself a party, may do so. He then becomes an intervenor. If his interests are adverse to those of both plaintiff and defendant, his designation as intervenor continues, but if his interests are identical with those of either plaintiff or defendant, he practically becomes identified in the litigation with such party, which ever it may be, and is dealt with as plaintiff or defendant accordingly.

² See Chapter III.

³ See Chapter III.

⁴ Andrews' Am. Law, —

RULES AT COMMON LAW.

At common law great attention was paid to joint and several rights and liabilities; and the general rule was, as to both plaintiffs and defendants, if the right involved were joint all those jointly interested were required to join as plaintiffs, and if the liability were contractual and joint, all must be sued as defendants; if it grew out of a joint tort, the tort feorsors could be sued jointly or singly or in such grouping as the plaintiff might elect. If the right were several, each one interested must sue separately, and if the liability were several, each must be sued separately.

As to whether there could be joint and several obligees in a contract the authorities are not harmonious; where such rights were recognized, the parties could sue jointly or severally; where such rights were denied, all the obligors must join if the agreement were binding, none could maintain an action on it if it were not. There is no difficulty regarding the same contract creating joint and several liability and in such case the obligors could be sued jointly, that is, all together, or each by himself; but no middle course treating some as jointly liable and others as severally so, was permitted.⁵

To the general rules above stated there are numerous exceptions, some of which have been adopted in our practice.

Among these is the doctrine that if the right were common or joint ownership of property, this conferred upon each owner a several right of possession of the whole property as against all persons except those interested with him, and hence in possessory actions against one not so interested, any one or any number of the co-owners could sue and recover.

Also in cases of several trespasses upon the same right by the same party, it was permitted to sue him in one action for all the wrongs, and later the doctrine was extended so that if several parties committed several trespasses on the same right, all might be joined in one suit.

Whether one, or any number of joint obligees less than all, could maintain any action at law to protect their rights without the voluntary joinder of all is a mooted question. Messrs. Stephens⁶ and Andrews.⁷ holding the affirmative, and Messrs. Pomeroy⁸ and Bliss⁹ holding the negative.

⁵ Dicey on Parties to Actions; Perry's Common Law Pleadings, chap. 5; Andrews' Stephens on Pleadings, chap. 1; Cooley's Elements of Torts, 38, 39; Bishop Non-Contract Law, chap. 27.

⁶ Andrews' Stephens on Pleading, sec. 19.

⁷ Andrews' Am. Law, p. 1105.

⁸ Code Rem., sec. 193.

⁹ Bliss on Code Plead., 2 ed., sec. 62.

RULE IN EQUITY.

There is no dispute that in equity all the unwilling parties could be made defendants, as in these courts parties were not necessarily divided according to their respective interests in the matter being litigated, but in such way as to enable the court to do justice among all those interested;¹⁰ hence in some instances of joint right, if one of the persons interested were without the realm, outlawed, or otherwise beyond the jurisdiction of the court, those joint owners or holders who were in the jurisdiction might sue and recover for the benefit of themselves and of the absentee,—the just interests of all parties being protected by the court in its final decree. In a few instances, also, in which some wrongful act or series of acts would similarly affect the rights of a large number of persons, such persons, or a part of them, were permitted to join in a common equitable proceeding to prevent the wrong,—as in the familiar case of a large number of property owners uniting to enjoin the collection of an illegal tax from each of them,¹¹ or where a number of different executions in favor of different parties, but against the same person, are levied on the same property which is claimed as exempt or as belonging to another; in which case, the claimant of the exemption or of the property may enjoin all the different execution plaintiffs in one suit.¹²

TEXAS RULES.

We have no legislation directly affecting the question of parties plaintiff, and the courts have followed the rules in equity on that subject.

The statutes have, however, made very important changes as to joinder of defendants.¹³ These will be noticed in connection with the several kinds of suits to which the rules have reference.

In applying these general rules to particular kinds of cases, we will consider them in the following order, suits affecting real estate, either as to the title or for damages thereto; suits relating to personal property and damages thereto; suits arising upon contracts; suits arising upon torts; and, last, some special forms of proceeding.

¹⁰ *Hargrave v. Lewis*, 6 Ga., 207.

¹¹ *Blessing v. City of Galveston*, 42 Texas, 641; *George v. Dean*, 47 Texas, 73.

¹² *Clegg v. Varnell*, 18 Texas, 301.

¹³ *Rev. Stats. 1895*, arts. 1203, 1204, 1256, 1257, 1258, 1259.

Actions Concerning Real Property.

Trespass to Try Title.

In this action all persons claiming under the title sought to be enforced in the suit are proper parties plaintiff, if they desire to join in the suit. If, however, the land is owned jointly by a number of persons, trespass to try title to the land may be brought and maintained by any one of the co-owners,—recovery of his own share being for his own benefit, and of the other shares inuring to the benefit of his co-owners. This grows out of the idea that each co-owner has an undivided, unascertained interest in each and every parcel of the land, and is therefore entitled to the possession of the whole as against trespassers.¹⁴

The right of any co-owner is not an exclusive one as against any other co-owner, and can not be asserted against him or them, or against persons holding under them or any one of them, so as to deprive them of the benefits of their interests. It follows that, if any one of the parties sued for real estate by one or more co-owners has title good against any of the co-owners, recovery would, to that extent, be defeated.¹⁵

The rule having been adopted that the cotenants could recover the whole land against a stranger, it was invoked in cases in which limitation had run against the shares of one or more of the cotenants, but had not run against the others, by the latter instituting suit for the whole tract and undertaking to recover it all. It was, however, held that where the defendants interposed a plea of limitation, and the facts showed that the claim of any co-owner, whether party to the suit or not, was barred at the time of the institution of the suit, this would defeat a recovery of the share so barred.

The rule as to the recovery of the whole interest by one cotenant does not hold when the suit is in the nature of the common law action of *quare clausum fregit* or other action which is exclusively for damage and does not involve the right of possession.

Partition.

In suits for the partition of real estate, all the persons interested in the title upon which the suit is based must be parties to the suit and

¹⁴ Croft v. Rains, 10 Texas, 523; Watrous v. McGrew, 16 Texas, 506; Sowers v. Peterson, 59 Texas, 220; Wright v. Dunn, 73 Texas, 295, 11 S. W., 330; Boone v. Knox, 80 Texas, 644, 16 S. W., 448; Musselman v. Strohl, 83 Texas, 477, 18 S. W., 857; Allen v. Peters, 77 Texas, 60, 13 S. W., 767; Davidson v. Wallingford, 88 Texas, 625, 32 S. W., 1030.

¹⁵ Murrill v. Wright, 78 Texas, 523, 15 S. W., 156; Boone v. Knox, 80 Texas, 644, 16 S. W., 448.

must be cited, either personally or in such way as is required in proceedings *quasi in rem*. Otherwise the case can not be tried and determined.¹⁶

This results from the same legal principles that are recognized in the recovery of the whole of the land from a trespasser by one of the joint owners,—namely, that each owner is seized of an undivided and unascertained interest in each and every parcel of the land; and as the result of a judgment of partition is to change this undivided right in the entire tract into a complete and separate title in severalty to a designated portion of the land, divesting out of each owner the title of every part except that allotted to him, a judgment so affecting the rights of any owner can not be rendered, unless he is before the court actually or in such manner as to bind in a proceeding *quasi in rem*. To illustrate,—six persons own equal, undivided interests in a tract of land. No one of them can say of any particular acre or acres, "This is my exclusive property;" but he has an undivided one-sixth interest in each any every part of the land. No five of these persons can separate their interests among themselves and from the interest of the sixth in such a manner as to bind him; nor is a court, not having active jurisdiction over either him or the land, authorized to act for him in the premises and to change his undivided interest in the whole land into a several title to a designated one-sixth of it. Therefore, every person entitled to an interest as joint tenant in the land sought to be partitioned is a necessary party, in the most strict sense of the term, to the suit for partition. As, however, such a proceeding is one *quasi in rem*, the court may proceed, as in other cases of that kind, upon constructive service on the defendant, where it has jurisdiction over the property.¹⁷ It is, of course, apparent that this requirement as to parties does not apply to persons holding claims or interests in the land under title adverse to that of the joint tenants. The plaintiffs are not seized of an undivided interest with such persons, but claim adversely to their title. Such persons, therefore, need not be joined.¹⁸ On the other hand, it is well settled that persons may adjudicate adverse interests in the land in controversy and obtain a decree of partition in the same suit, if necessary allegations are made and all necessary parties joined.¹⁹ Thus, if A claims an entire tract of land, and B claims an undivided one-half interest therein under the same title, A may bring suit against B for the whole tract, thereby seeking to have B's

¹⁶ Cryer v. Andrews, 11 Texas, 181; Lewis v. Ames, 44 Texas, 348; Glascock v. Hughes, 55 Texas, 469; Buffalo Bayou Ship Co. v. Bruly, 45 Texas, 8; Noble v. Meyers, 76 Texas, 281, 13 S. W., 229.

¹⁷ Taliaferro v. Butler, 77 Texas, 578, 14 S. W., 191; Foote v. Sewall, 81 Texas, 662, 17 S. W., 373.

¹⁸ Noble v. Meyers, 76 Texas, 282, 13 S. W., 229.

¹⁹ Noble v. Myers, *supra*.

claim adjudged invalid as against him, and may pray, in the alternative, that, if the court should hold that B did own an undivided interest in the land, the shares of the respective parties be adjudged to them and the land be partitioned between them. Or, if in such a case, A made no prayer for partition, B could by appropriate cross-action set up his rights and ask for an adjudication, and in the event he established his right, he could have the land partitioned.

ACTIONS TO REMOVE CLOUD FROM TITLE.

No such suit could be brought in a common law court. In equity, it could be brought only by a person in possession against one out of possession who was asserting a claim or interest in the land to the detriment of the possessor's title. And no such suit could be maintained upon an equitable title.²⁰ These rules are not recognized in Texas, and possession is not here essential to the maintenance of plaintiff's case, and an equitable title may be relieved from a cloud.²¹ In these suits, the person or persons owning the land may sue, joining as defendants all those who are asserting an adverse claim of such character as casts a cloud over his or their title and interferes with its full and legal enjoyment. In these cases, one joint tenant may, by making appropriate averments as to the facts, bring the suit for the benefit of all.

SUITS TO FORECLOSE LIENS.

There are a great many cases in our Texas reports on this subject. The question of parties is simple so long as neither party to the contract parts with his rights thereunder, that is, until transfer of either the debt or land is made; but uncertainty enters so soon as such a transfer has taken place. All vendors' liens grow out of contracts for sale of land, and it is impossible to understand the rules as to parties to suits on such contracts without some knowledge of the legal nature of these contracts and of the rights of parties under them.

These contracts are of two classes,—first, those executory as to the title; and second, those executed as to the title. Of the executory contracts there are three kinds; first, those in which the vendor does not execute any deed at all, but gives a bond to make title to the vendee upon compliance with the terms of the sale; second, those in which the vendor makes a deed absolute on its face, but simultaneously takes

²⁰ Thomson v. Locke, 66 Texas, 383, 1 S. W., 112.

²¹ Thomson v. Locke, supra; Sloan v. Thompson, 4 Texas Civ. App., 419, 23 S. W., 613.

back a mortgage or a deed of trust from the vendee to secure the purchase money; and, third, those in which the vendor executes a deed formal in all respects, except that it recites the fact that all or a part of the purchase money is unpaid and reserves an express lien on the land to secure its payment. In each of these classes of cases it is held that the superior title to the land remains in the vendor and that only an inchoate equity, or right to acquire the land upon compliance with his contract, passes to the vendee.²² Executed contracts are of two kinds: first, those in which all the terms of the contract as to conveyance of title, payment, etc., are performed; second, those in which a deed formal in every respect is executed and delivered to the vendee, retaining no express lien for the purchase money, although all or a portion thereof remains unpaid. There being, in the first of these classes, no term of the contract remaining unperformed, no litigation can arise as to foreclosing liens. As to those of the second class, the decisions hold that the title vests in the vendee,—subject, however, to an implied lien in behalf of the vendor to secure the unpaid purchase money.²³

Under the very liberal rules which obtain here with reference to the assignments of rights and the power of the assignee to sue the vendor in any of the four cases mentioned in which the purchase money, or a part of it, remains unpaid can assign the debt due him, and such assignment will carry with it the lien to secure the payment, the party buying having the right to sue in his own name for the purchase money and to foreclose the lien for his own benefit.²⁴ Whether or not the vendor, assignor of the debt, would be a proper or necessary party to such a suit would depend upon the terms of the assignment—in construing and determining which the ordinary rules applicable to other cases of contract govern. Under our peculiar system, it is held that in all cases in which the contract is executory, i. e., the title has not passed, the vendor has the option, upon default in payment of purchase money, to sue for the amount due and foreclose his lien on the land to secure payment, or to regard the contract as at end and bring suit of trespass to try title for the land against the vendee. This right of choice of remedies in the vendor does not pass to his assignee by simple assignment or transfer of the purchase money debt; but the extent of the right of an assignee under such an assignment of

²² Webster v. Mann, 52 Texas, 416; Cassaday v. Frankland, 55 Texas, 452; Rogers v. Blum, 56 Texas, 1; Hamblen v. Folts, 70 Texas, 135, 7 S. W., 834; Kaufman v. Brown, 83 Texas, 45, 18 S. W., 425.

²³ Baker v. Compton, 52 Texas, 261; Riggs v. Hanrick, 59 Texas, 570.

²⁴ Moore v. Raymond, 15 Texas, 556; Scott v. Mann, 36 Texas, 157; Elliot v. Blanc, 54 Texas, 218; Russell v. Kirkbridge, 62 Texas, 456; McCamley v. Waterhouse, 80 Texas, 343, 16 S. W., 19.

the debt is to collect the debt and to foreclose the lien securing it.²⁵ He can not maintain an action of trespass to try title unless he has bought the interest of the vendor in the land and has had such interest formally conveyed to him. By an assignment of the debt and a conveyance of the vendor's remaining interest in the land, he would acquire all the rights of the vendor and could enforce them just as the vendor could have done if no assignment had been made. If these distinctions regarding the effect of different contracts of sale upon the title to the land are kept in mind, but little difficulty as to parties can arise in those cases in which the vendor alone has transferred his rights.²⁶

The question, however, of who are necessary and who are proper parties in cases of transfers or sales by the vendee presents more difficulty. The same distinction between executed and executory contracts, must be kept in mind. The vendee under an executory contract for the purchase of land does not acquire the legal title to the land, as against the vendor, but only an inchoate equity in it. This equity is transferable, but the person buying acquires no greater right than was held by his vendor, the vendee in the former contract. As the superior legal title as against the first vendee—now become second vendor—remained in the first vendor, and as the second vendor is charged by law with notice of this fact and has obtained no greater right than his vendor had, it follows that the original vendor can enforce against the second vendee every right that he could have enforced against the first vendee. And, since the right of the second vendee is but an equity and the original vendor could upon default of the original vendee rescind the contract and enter and take possession of the land, then it also follows, that as no part of his right was lost by the sale, he may rescind the contract, bring suit against the second vendee, and recover from him the possession of the land; or he may, if the first vendee be still in possession, sue him without the necessity of joining the second vendee, and judgment so obtained will be enforced against the second vendee's interests and rights in the land, unless by appropriate action he make himself a party and have his equities adjudged.²⁷ As the original vendor can not be compelled to receive the second vendee as his debtor, so he may elect to sue the original vendee for the amount due, foreclose the lien against him, and buy in the land, thereby acquiring title under which he could obtain possession of the land as against the second vendee, although he had not been a party to the proceedings. In this sense the second vendee is not a

²⁵ *Baker v. Compton*, *supra*; *Russell v. Kirkbridge*, *supra*; *Elliot v. Blanc*, *supra*.

²⁶ *Crafts v. Daugherty*, 69 Texas, 480, 6 S. W., 850; *Hamblen v. Folts*, 70 Texas, 136, 7 S. W., 834.

²⁷ *Ufford v. Wells*, 52 Texas, 612; *Foster v. Powers*, 64 Texas, 247.

necessary party to the suit against the first vendee, either in the action of trespass to try title or in that to foreclose the vendor's lien, but in neither case would a judgment obtained without joining the second vendee be final against him. By intervening in the suit brought by the original vendor and setting up his equities and tendering the amount due, he could defeat the foreclosure of the lien or the recovery of the land, as the case might be. If he were not joined and did not intervene in the suit and a judgment for the amount due were obtained in a suit for the debt and the lien foreclosed, the land sold and bought in by the vendor, or a third party with notice of the rights of the second vendee he may still within a reasonable time bring an action to redeem the land and, by tendering the amount due and all the costs, can secure the benefits of his contract. To do this, however, he must take the initiative and must not be guilty of any laches.²⁸ If the original vendor desires to cut the second vendee off from this privilege, he should make him a party defendant to the suit in the first instance. If, however, at the foreclosure sale the land were bought in by a third party without any notice of his rights, it seems that the second vendee would not have any right of redemption even though he had not been joined in the foreclosure suit.²⁹

With reference to executed contracts,—those in which title to the land passes,—the rules as to parties are in some respects different. As the vendee in such case acquires the legal title and not an inchoate equity, and the purchaser from him acquires the same title, no action of trespass to try title can be brought by the vendor against either the original vendee or the second vendee. He does not own the land and can not recover it. His only remedy is to sue for the debt and foreclose his lien; and, as this would be a suit to foreclose a lien upon property the legal title to which was not in the debtor, in order to affect in any way the interests of the owner by the suit and judgment of foreclosure, he must be made a party to the suit. In these cases, unlike those just referred to, the burden of taking the initiative in determining their respective rights rests on the vendor, and he can in nowise affect the second vendee's right either of possession or of title by a proceeding to which the second vendee is not a party. So that in this class of cases, the second vendee is a necessary party in a more comprehensive sense than in the former.³⁰

²⁸ *Ufford v. Wells*, supra; *Foster v. Powers*, supra; *Land & Cattle Co. v. Boon*, 73 Texas, 548; *Pierce v. Moreman*, 84 Texas, 596; *Bradford v. Knowles*, 86 Texas, 505; *Spencer v. Jones*, 92 Texas, 516. *Robinson v. Kumpmann* - 5 C.C. 60

²⁹ Cases cited in last note.

³⁰ *Bradford v. Knowles*, supra, and cases cited therein.

Rules When Series of Notes Given.

It is a very general custom in selling land to have a number of payments maturing at different times, and to take negotiable notes evidencing these different installments, all of which are secured by lien, expressed or implied, on the lands. Quite a number of cases have arisen presenting different questions as to parties and priority of right in suits of this kind where the notes are held by different persons. The general doctrine on the subject in the absence of agreement to the contrary is that among the several assignees of the notes no one is entitled to preference. The difference in the time of maturing of the several obligations does not make the notes maturing later junior liens as against the notes maturing earlier, and each is entitled to its security and proportionate distribution of the proceeds of the property. The result of this is that all persons holding any of such notes should be made parties to the suit seeking to foreclose the lien securing any one of them. If the suit is brought on the notes last falling due, the lien should be foreclosed for the benefit of the holders of the entire series of notes, and the proceeds of the sale should be distributed *pro rata* among them. If before maturity of all the notes suit for foreclosure is brought by the holder of the note maturing first or of one or more maturing at some intermediate date, the amount then due on each mature note should be computed, and the amount then payable on each note subsequently falling due should be estimated by the rules of discount, and judgment should be rendered dividing the proceeds of the security among the holders of the different notes according to the different amounts so found. Any balance which might remain due upon the notes already mature could be immediately collected out of any property of the defendant subject to execution, but no execution could be awarded as to any balance not then due, until the respective dates of the maturity of each, at which time if the judgment had not been paid off, execution should be issued to enforce its collection.³¹

Considerable diversity of opinion exists as to the respective rights of the assignor of a portion of such notes and his assignees to the proceeds derived from the foreclosure sale of the property in the absence of any special contract between them. The courts of other States are about equally divided on the subject, The Texas Supreme Court, in *Salmon v. Downs*,³² approved an opinion by Judge Quinan, Commissioner of Appeals, which held unequivocally that the assignor, in

³¹ *Tinsley v. Boykin*, 46 Texas, 596; *Gillmour v. Ford*, 19 S. W., 442; *Barbish v. Oatman*, 39 S. W., 191.

³² 55 Texas, 243.

absence of express contract, was not in any sense a guarantor of the other notes nor bound to make them good nor even to permit all the proceeds of the property to be distributed among them, but that he was entitled to share in such proceeds *pro rata* with the others. This case has been several times approved.³³ In the case of *Whitehead v. Fisher*,³⁴ in which there was a parol agreement that the assignor should not share in the proceeds of the property until the notes assigned should be fully paid, the Supreme Court sustained the agreement, and said also that the law would require this course in the absence of agreement.

In *Douglas v. Blount*,³⁵ decided by the Court of Civil Appeals at San Antonio, the rights of the assignee of one of a series of vendor's lien notes against the assignor for preference in the proceeds of the property upon foreclosure of the lien came up directly for adjudication. The court reviewed many cases, including all those cited in the last two notes, and held that the assignee was entitled to preference. A writ of error was applied for to the Supreme Court and denied, thus giving apparent sanction to the rule announced. As an abstract proposition the conclusion thus reached may be regarded as correct, but the doctrine of *stare decisis* seems to have been entirely ignored in arriving at it, and the question can hardly be regarded as settled.

SUITS TO FORECLOSE MORTGAGES AND DEEDS OF TRUST.

In Texas a mortgage or a deed of trust, except in case of sale of land and contemporaneous taking of the instrument as before explained, is but an incident to the debt, and the beneficial title in the land incumbered is regarded as in the mortgagor or maker of the deed of trust, as the case may be; and unless there is specific provision clearly expressed to the contrary, he is entitled to possession, and upon default of the payment of the money the mortgagee or the beneficiary under the deed of trust can not take possession of the land nor maintain an action of trespass to try title for it, but must either have his deed of trust executed according to its terms or sue to foreclose the lien created by the contract.³⁶ This being so, subsequent vendees from the mortgagor or grantor in the deed of trust are regarded as holders of

³³ *Wooters v. Hollingsworth*, 58 Texas, 371; *McMichael v. Jarvis*, 78 Texas, 671, 15 S. W., 111.

³⁴ 64 Texas, 638.

³⁵ 55 S. W., 526.

³⁶ *Wright v. Henderson*, 12 Texas, 43; *Hudson v. Wilkinson*, 45 Texas, 444; *Soell v. Hadden*, 85 Texas, 182, 19 S. W., 1087; *Baldwin v. Peet*, 22 Texas, 718; *Aggs v. Shackleford Co.*, 85 Texas, 149, 19 S. W., 1085.

the substantial title and must be made parties to any suit brought for the purpose of collecting the debt out of the property, and unless they be so joined, the title held by them will not be affected by the suit or judgment or sale thereunder.³⁷

SUITS FOR DAMAGES TO LAND.

Where suit is brought to recover for damages done to real estate, it is proper to join as plaintiffs all persons interested in the title. Strictly speaking, one cotenant has not the right to recover the entire damages done to the property. He may sue by himself and maintain his suit, but if the defendant interpose objection at the proper time, the recovery will be limited to the *pro rata* share of the plaintiff.³⁸ If the defendant neglects to interpose such objection, and allows the recovery of the whole amount of damages against him, this would be no defense against a claim by the other cotenants for their respective shares, and he would be compelled to pay them, even though he had already paid the first judgment.

ACTIONS WITH REFERENCE TO TITLE AND POSSESSION OF PERSONAL PROPERTY.

In suits involving title to personal property all joint owners should be made parties plaintiff. The doctrine with reference to real estate which permits one cotenant to recover for all would seem to be applicable here, but I have found no case in which the point is made or directly decided; and it seems to be the universal practice to join all owners in such suits. This joinder is, of course, necessary only in those cases in which the plaintiff proves title by evidence besides mere possession. Prior possession of personal property is always *prima facie* evidence as to title and is good as against a trespasser; and of course such possession by one co-owner would be as effectual to sustain the suit as by a person who had no other title whatever.

In a suit for damages for conversion or injury to the property all the co-owners should join as plaintiffs.³⁹

³⁷ Hall v. Hall, 11 Texas, 547; Mills v. Traylor, 30 Texas, 11; King v. Brown, 80 Texas, 278, 16 S. W., 39; Clark v. Gregory, 87 Texas, 193, 27 S. W., 56.

³⁸ May v. Slade, 24 Texas, 208; Williams v. Davis, 56 Texas, 250; Gillum v. Railway Co., 4 Texas Civ. App., 622, 23 S. W., 716; Lee v. Turner, 71 Texas, 266, 9 S. W., 149.

³⁹ Hill v. Newman, 67 Texas, 266, 3 S. W., 271.

PARTITION.

Suits for partition of personal property are very rare. The same general principle applies, however, as in the partition of real estate, and all the co-owners must be parties.⁴⁰

SUITS TO FORECLOSE LIENS ON PERSONAL PROPERTY.

There are no peculiar principles of law applicable here. If the lien is one growing out of contract, all parties to the contract and those directly interested therein are ordinarily necessary parties; but to this there are numerous exceptions. Some have already been discussed under the head of "Trustees and Beneficiaries,"⁴¹ and of "Assignments."⁴² If the purpose of the suit is to foreclose the lien existing in behalf of a number of persons to compel a general distribution of the funds in the hands of the trustee or assignee, all the beneficiaries should be made parties. If this is not desired, they need not be joined. In the latter case, if the lien holders have rights prior to those of the plaintiff, his foreclosure sale would be made subject to such prior liens and would not affect them. The purchaser at such foreclosure sale would acquire only an equity of redemption. If the rights of the lienors are subsequent to the rights of the plaintiff, then by the foreclosure suit and sale the plaintiff would not cut off their equity of redemption, but would acquire the interest of the debtor in the property upon which the lien rested—subject to the right of redemption by the subsequent lienors who had not been made parties.

SUITS FOR DAMAGE TO PERSONAL PROPERTY.

Here the same principles are applied as in similar suits regarding real estate. The plaintiff, if he is sole owner, is entitled to recover the entire amount of injury; if he is a co-owner, the defendant could by making the defense at the proper time and in the proper way, have the damage apportioned, and the plaintiff would recover only his *pro rata* share. If no such defense was made and the full amount of the damage was recovered, the wrongdoer would not thereby be protected from liability to the other co-owners for their respective shares.⁴³

⁴⁰ See cases in note on that head.

⁴¹ Ante, p. 173.

⁴² Ante, p. 172.

⁴³ Hill v. Newman, *supra*.

SUITS ON CONTRACTS. .

At common law the difference between joint, joint and several, and several contracts, is great and is rigidly insisted upon. Joint contracts are those in which the parties are jointly and collectively bound to perform the duties or are entitled collectively to enjoy the rights resulting from the contract. The extent of the liability of each joint obligor is as great as if he alone were bound for its performance, but his contract does not bind him to perform his undertaking singly, but only in connection with all his co-obligors. In the same way the rights of the co-obligees are due to them collectively and not to any one of them separately. It results from this that if a contract is disregarded or violated by any one, all persons interested in the right must at common law join in the suit to enforce it. That is—if A, B, and C are joint obligees in an undertaking, and this is not performed, A can not sue on it, nor can A and B, but A, B and C must sue jointly, because performance is not due to A, nor to A and B, but to A, B, and C; and no number less than all can enforce the undertaking. The same rule applies at common law to the obligors. If A, B, and C are jointly liable on an undertaking to do a certain thing, it is not regarded as the separate contract of A, nor as the joint contract of A and B, but as the joint contract of A, B, and C. A suit to enforce it must be brought against them all. These rules are at common law affected by the doctrine of survival. If one of a number of persons holding a joint right dies, his interest does not go to his heirs, but vests in the remaining joint obligees, and this process may continue until by the death of all but one of them the whole benefit is vested in this sole survivor. As under the law no one is entitled with him, this right upon his death descends as all similar property held in severalty by him. And so with the obligation; upon the death of one obligor, his obligation ceases, and his estate is not bound, the whole burden falling on the surviving obligors. This process may continue until only one is left, upon whom the whole burden rests as a several obligation. This is the common law doctrine of survivorship. It results from this doctrine that in suits on joint obligations, if one of the joint obligees die, the remainder must all sue, and the representatives of the deceased are not proper parties. If one or more of the obligors die, all the surviving obligors must be sued jointly, and the representatives of the deceased obligors are not proper parties. In equity the rule as to joinder of parties is not so strict.

There is a different class of contracts which are known as several. These are undertakings in which the parties agree to bind themselves separately, that is, in which the obligees hold separately or the obligors promise to perform separately. There may be a number of parties to

the contract, but each is entitled to the benefits or undertakes to discharge the whole obligation for and by himself. The right or the undertaking is as much his as if no other party were entitled with or had promised with him. In such a case, if the obligees hold separately (which is very rare), the right exists in behalf of each and may be enforced by each in its entirety—the one enforcing it, however, being subject to an account to the other obligees.⁴⁴ In like manner, if the obligors are bound severally, it may be enforced against each of them; just as if no other party were bound.

There is still another class of contracts combining many of the characteristics of each of the preceding. These are known as joint and several contracts. Here the rights and duties of the parties are at once collective and single. So that the obligation may, at the option of the obligee, be regarded as the joint obligation of the whole number of obligors, or as the several obligation of any one of the obligors, and may be sued on accordingly. The obligee, however, is obliged to consider it either joint as to all or several as to all. He could not proceed against any number of the obligors less than all as upon a joint obligation.

So far as plaintiffs are concerned, the rules of common law are modified very little, if at all, in the Texas practice. All obligees in a joint contract must join in the suit to enforce it, and a failure to do so will certainly subject the suit to a plea in abatement if interposed in time, and according to some authorities will defeat a recovery even if no plea in abatement is filed.⁴⁵ However, our statutes and decisions construing them have materially modified the common law as to defendants in suits upon joint undertakings, so that all joint obligors who are principals are subject to be sued either jointly or separately with all or any less number of their co-obligors as the plaintiff may elect.⁴⁶

Where a party is surety or in any way secondarily liable upon a contract, judgment can not be rendered against him, unless simultaneously therewith or prior thereto a judgment is or has been rendered against the principal obligors, except in those cases in which the principal obligor resides beyond the limits of the State, or in such part of same that he can not be reached by ordinary process of law, or his place of residence is not known and can not be ascertained by the use of reasonable diligence, or he is dead or notoriously insolvent. The fact that the plaintiff has been unable to obtain service on the principal obligor does not bring the case within the operation of this statute

⁴⁴ Beach on Modern Law of Contracts, chap. 18.

⁴⁵ Holliman v. Rogers, 6 Texas, 91; Stachely v. Pierce, 28 Texas, 328; Hanner v. Summerhill, 6 Texas Civ. App., 764, 26 S. W., 906.

⁴⁶ Rev. Stats. 1895, art. 1203; Wooters v. Smith, 56 Texas, 198; Keesey & Murphy v. Old, 82 Texas, 22, 17 S. W., 928; Miller v. Sullivan, 89 Texas, 480, 35 S. W., 362.

unless the inability be for one of the reasons enumerated.⁴⁷ Where a party is in fact a surety as between the obligors, but appears on the face of the obligation as principal, this article does not apply. In such case suit may be brought against any one of those appearing as principals without any of the others, or in case they are all sued a discontinuance may be entered as to any one of them, although as between him and his obligors he was in fact a surety.⁴⁸

TORTS.

In suits for tort on property where damage is sought to be recovered all parties owning the property should be plaintiffs.⁴⁹ Where the suit is for the recovery of the property itself, it may be brought by any one of the co-owners and will inure to the benefit of all. This is settled as to real estate, and as to personal property the same rule is thought to apply, though the point has not been definitely decided.

With reference to the joinder of defendants in tort cases, the rule is universal that any or all of the joint tort feorsors may be joined at the option of the plaintiff. He is not required to sue all or to sue any one, but may sue any number. He may maintain his suit against each separately and may recover judgments against as many as he can show himself entitled to recover against; he can, however, have but one satisfaction.⁵⁰ As before seen, where the plaintiff has a right which has been violated by several separately, he may sometimes join these separate wrongdoers in one suit.

MANDAMUS.

In these suits all parties interested in the rights to be enforced should be joined as plaintiffs. As defendant, the officer whose action it is desired to constrain must of course be sued, and in those cases where the action sought to be compelled would directly affect the rights or claimed rights of other parties, such other parties should be joined; as in the case of a *mandamus* against a county surveyor to compel the survey of a tract of land upon which a location is sought

⁴⁷ Look v. Henderson, 4 Texas, 303; Moore v. Janes, 6 Texas, 227; Burden v. Cross, 33 Texas, 686.

⁴⁸ Hooks v. Bramlette, 1 W. & W. C. C., sec. 867; Ritter v. Hamilton, 4 Texas, 327; Lewis v. Riggs, 9 Texas, 165. Contra: Unger v. Anderson, 37 Texas, 550.

⁴⁹ See authorities on Suits for Damages to Land, *supra*.

⁵⁰ Hardy v. Broadus, 35 Texas, 686; Loftus v. Maxey, 73 Texas, 246, 11 S. W., 272; Giddings v. Baker, 80 Texas, 312, 16 S. W., 111.

to be made, if there are adverse claimants to the land they must be joined as parties with the surveyor; otherwise, it might be determined in the first suit that the land was vacant and he might be compelled to survey it for the plaintiff, and afterwards parties adversely interested might institute another suit and obtain a different verdict, and compel him to survey the land for them.⁵¹

QUO WARRANTO.

The State alone can institute proceedings of this kind. It is usually done upon the relation of some party who is interested in the matter to be brought before the court, but the State alone can be a party plaintiff. It acts through its attorney general, district or county attorney, as the case may be. There are no special rules with reference to defendants.⁵²

JUDGMENTS.

In a suit to set aside or vacate a judgment, it is the general rule that all persons must be made parties who were parties to the original proceedings.⁵³ If, however, the judgment is divisible, it will suffice to join only so many of the original parties as were interested in such part of the judgment as is sought to be set aside.

The same is true of suits to enjoin the execution of judgments or to revive judgments. In suits upon a judgment as an original cause of action, the same doctrines as to joint and several obligations apply as in cases on contracts.

OFFICERS AND OFFICIAL BONDS.

There has been special legislation on this subject as follows.⁵⁴

"Art. 1205. In any suit brought by the State of Texas, or any county of said State, against any officer who has held office more than one term and has given more than one official bond, the sureties on

⁵¹ *Smith v. Power*, 2 Texas, 68; *Cullem v. Latimer*, 4 Texas, 334; *Commissioner Land Office v. Smith*, 5 Texas, 484; *Watkins v. Kirchain*, 10 Texas, 381; *Gaal v. Townsend*, 77 Texas, 465, 14 S. W., 365.

⁵² *Wright v. Allen*, 2 Texas, 160.

⁵³ *Duncan v. Bullock*, 18 Texas, 544; *York v. Cartwright*, 42 Texas, 142; *Williams v. Nolan*, 58 Texas, 712; *Slaughter v. Owens*, 60 Texas, 671.

⁵⁴ Rev. Stats. 1895.

each and all of such bonds may be joined as defendants in one and the same suit, whenever it is alleged in the petition that it is difficult to determine when the default sued for occurred, and which set of sureties on such official bonds is liable therefor.

"Art. 1206. In any suit by the State of Texas on the official bond of any State officer, any subordinate officer who has given bond, payable either to the State or to such superior officer, to cover the default sued for or any part thereof, together with the sureties on his official bond, may be joined as defendant in one and the same suit with such superior officer and his bondsmen, whenever it is alleged in the petition that both of such officers are liable for the money sued for, to the end that all equities may be adjusted between them in one suit.

"Art. 1207. Whenever any official bond is made payable to the State of Texas or any officer thereof, and a recovery thereon is authorized by or would inure to the benefit of parties other than the State, suit may be instituted on such bond in the name of the State alone for the benefit of all parties entitled to recover thereon."

Except as affected by these statutes, parties in these suits are regulated by the general rules.

In suits against any sheriff or constable, or a deputy of either, for damages for any act done in their official capacity, the sureties on their official bonds may be joined, and also the sureties on any special indemnifying bond, which may have been taken by such officer in the particular transaction out of which the litigation grows.⁵⁵ It is also recognized as the correct practice for the plaintiff to join these sureties in the first instance. The amount of recovery against the official bondsmen is limited to the amount of the official bond, as they have no special connection with the alleged wrong, but the indemnifying bondsmen and the party in whose behalf and at whose instance the officer acted are regarded as joint tort-feasors with the officer and are liable for the actual damage to the full extent of the proximate injury.

CARRIERS.

By legislative act passed in 1895,⁵⁶ construction has been placed upon certain designated contracts by common carriers; and in every contract of carriage, the option is given to a shipper who has sustained damage anywhere on the route to sue any one of such carriers separately, without the necessity of joining the others.

⁵⁵ Rev. Stats. 1895, art. 1204; *Cabell v. Shoe Co.*, 81 Texas, 104, 16 S. W., 811.

⁵⁶ Rev. Stats. 1895, arts. 331a, 331b.

ACTION FOR INJURIES RESULTING IN DEATH.

In this action no one is entitled to sue except the parties mentioned in the statute; these are the parents, husband, wife, and child or children of the deceased, or the administrator or executor of the estate suing for the benefit of these statutory beneficiaries. The damages are, however, to be apportioned among all these persons as the jury may determine. All or any one of the parties may bring the suit, but in the latter case it must appear upon the record that the suit is brought for the benefit of all. If any one of the parties has settled his claim, this fact must be alleged by the plaintiffs as an excuse for not joining him, and it must be proved upon the trial. It is not sufficient to file affidavit setting up such fact in response to a motion for rehearing, nor will the fact that the right of one claimant was barred by limitation be sufficient excuse for not making him a party.⁵⁷

HOW OBJECTIONS TO NONJOINDER OR MISJOINDER OF PARTIES MAY BE AVOIDED OF.

In order to prevent misunderstanding of the decisions on this subject, it is essential to keep constantly in mind the difference:

First.—Between the misjoinder and nonjoinder of parties.

Second.—Between parties necessary to decision of main issues and parties necessary merely to some ancillary issue.

Third.—Between parties necessary to main issue and those proper to it.

Fourth.—Between parties necessary to ancillary issues and those proper to them.

Fifth.—Between parties plaintiff and defendant.

Sixth.—Between defects apparent on the face of the plaintiff's petition and defects not so apparent.

Seventh.—Between pleas in abatement and demurrers to a petition.

Eighth.—Between general demurrers and special exceptions.

Ninth.—Between defects appearing for the first time on hearing the evidence and those appearing sooner.

Tenth.—Between judgments by default and judgments on trial.

Though the judges seem to keep these differences very well in mind in the determination of cases, they sometimes lose sight of them in writing their opinions.

⁵⁷ Railway Co. v. Spiker, 59 Texas, 437; Railway Co. v. Culberson, 68 Texas, 664, 5 S. W., 820; Railway Co. v. Wilson, 85 Texas, 516, 22 S. W., 578.

Nonjoinder of Necessary Parties.

A party necessary to the main issue in the case is, as we have seen, one without whom no judgment can be rendered determining the matter in controversy. In cases of nonjoinder, if a party necessary to the main issue is omitted, such omission is fundamental, and will require either a dismissal of the suit or a stay of proceedings until such party can be brought in. This is the rule no matter when or how his absence may become apparent.⁵⁸

The objection of nonjoinder of such a party may be made by plea in abatement,⁵⁹ general demurrer, special exception,⁶⁰ objection to testimony, motion for new trial,⁶¹ motion in arrest of judgment, suggestion of fundamental error on appeal,⁶² or otherwise, whenever it comes to the knowledge of the court the result would be the same, either the dismissal or stay of the case.

Nonjoinder of Proper Parties.

The effect of the failure to join one who is not a necessary but merely a proper party to the main issue in the case, but who is a necessary party to some ancillary or subsidiary issue, would not affect the court's power to adjudge the main issue, but would prevent the adjudication of the subsidiary matter. If, therefore, it was desired by the party sued to prevent the determination of the main issue until such ancillary issue were also determined, he would be compelled to call the court's attention to the nonjoinder of such party in due time and order of pleading. This would be by plea in abatement, if the nonjoinder did not appear on the face of the petition, or by special exception if it did so appear. If this were not done the court would proceed to hear and adjudicate the principal issue, but would refuse to determine the subsidiary one.

Sometimes the facts which constitute a defect of parties may be taken advantage of on the introduction of evidence or even later in the proceedings. These are in almost, if not in every, instance, cases in which the objection consists in a variance between the allegations in the pleadings and the evidence offered. For instance, a suit is brought against a person on a note, described as having been executed by him.

⁵⁸ *De la Vega v. League*, 64 Texas, 205; *Ship Channel Co. v. Bruley*, 45 Texas, 8.

⁵⁹ *May v. Slade*, 24 Texas, 208; *State v. Goodnight*, 70 Texas, 688, 11 S. W., 119.

⁶⁰ *Kegans v. Allcorn*, 9 Texas, 34; *Davis v. Willis*, 47 Texas, 154.

⁶¹ *Ebell v. Bursinger*, 70 Texas, 122, 8 S. W., 77.

⁶² *Hanner v. Summerhill*, 7 Texas Civ. App., 235, 26 S. W., 906.

Here no defect of parties would appear on the face of the pleading; for the defendant might well have executed just such a note. On the trial the plaintiff offers in evidence the joint note of the defendant and another; an objection to the note on ground of variance would be fatal. The defendant may anticipate this and plead in abatement the nonjoinder of his co-obligor, if he desires; or he may wait and object to the introduction of the evidence because of the variance. Either course would be fatal to the plaintiff's case, but would leave the cause of action unaffected.

The proper course is to sue both parties, or to sue one of them, giving the reasons for not joining the other; in each case properly describing the instrument as the joint obligation of both parties. If only one be sued, the instrument being properly described, the failure to join the other, if available at all, which is extremely doubtful, must be presented by plea in abatement or by special exception—otherwise the court will render judgment against the sole defendant. In other words, if the instrument be properly described, the failure to join the co-obligor can not be availed of in excluding the testimony.

Misjoinder.

The effect of misjoinder—that is, the bringing before the court a party who has no such connection with the matters in litigation as to make him either a necessary or a proper party,—will depend upon the circumstances of the case. If he is a plaintiff and is not alleged to have any joint right or interest, but is brought in in connection with some matter improperly claimed to be pertinent to the cause, his presence usually affects only the costs of the case. The other plaintiffs will recover, but he will fail and will have to pay his own costs. If, however, he is presented in the pleadings as jointly interested with the other plaintiffs, failure to establish such joint right will be fatal to the recovery of all the plaintiffs alike.⁶³

If he is a defendant and the suit is based on contract alleged to be joint between him and his codefendants, failure to introduce such joint contract will prove fatal, if objected to when the testimony is offered, or it may be even at later stages of the proceedings. If the suit is on a tort, the doctrine of variance is not applied between joint and several wrongdoers, and the plaintiff can recover against any number of the alleged wrongdoers who may be shown to be guilty, even though his proof fail as to others joined with them.⁶⁴

⁶³ *Stachely v. Pierce*, 28 Texas, 328; *Ship Channel Co. v. Bruley*, 45 Texas, 8.

⁶⁴ *Navigation Co. v. Dwyer*, 29 Texas, 384; *Morill v. Hopkins*, 36 Texas, 687.

NEW PARTIES.

Our statutes provide for the making of new parties during the progress of the case. This may be done at the request of those already either plaintiffs or defendants. Sometimes this is done by one of the parties to meet an objection of nonjoinder raised by the other; sometimes it is done voluntarily to enable the court to settle more satisfactorily than it otherwise might some of the matters presented to it. The principles that apply here are the same as those before considered in joining causes of action and making parties in the first instance, and need not be repeated. The statute on the subject is as follows: "Before a case is called for trial, additional parties, may, when they are necessary or proper parties to the suit, be brought in by proper means either by plaintiff or defendant upon such terms as the court may prescribe, but such parties shall not be brought in at such a time or in such a manner as to delay unreasonably the trial of the case."⁶⁵

This was enacted in 1879, prior to which time the matter had been left to the courts, without any express statutory provisions.⁶⁶

In *Baily v. Trammell*,⁶⁷ the Supreme Court, through Judge Moore, says: "Nor do we know of any rule of practice by which a defendant is authorized to make a party plaintiff in a cause. If the proper plaintiffs are not joined in the action, the defendant may take advantage of this plea, and have the proper parties made by the plaintiff, or cause the suit to be dismissed; or in some cases he may take advantage of a defect of parties on the trial. But the defendant has no right to thrust into the cause a third person, as a party plaintiff, against the wishes or without the consent of the original plaintiff. The action of the court ordering Henry Trammell to be made a party plaintiff was for this reason erroneous, but it was an error of which the plaintiffs in error can not complain. If it is necessary for the protection of the rights of a defendant, that a person or persons who have a joint interest with the plaintiffs should be brought before the court, he may unquestionably cause this to be done, but in such case it should be by a proceeding in the nature of a cross-action or bill against the plaintiff and such third parties. Although such proceeding would be treated as part of the original suit, yet, in this branch of litigation, the original defendant has become the actor, and has the rights together with the responsibilities of a plaintiff, and the other parties occupy the position and have the privileges of defendants."

⁶⁵ Rev. Stats. 1895, art. 1208.

⁶⁶ *Kegans v. Allcorn*, 9 Texas, 34.

⁶⁷ 27 Texas, 326.

The statute does not change this rule nor give to any one the power to compel another to become an actor in a law suit. He may be brought in as a defendant; or the rights of others interested with him may be lost by his failure to come in; but he can not be compelled by the defendant to become a plaintiff. Whether one plaintiff can compel another person interested with him to permit the use of his name against his will seems to be an open question at common law, and I have found no Texas case on the subject. Under the statute the right to make new parties must be exercised "before the case is called for trial," and the courts have enforced this condition.⁶⁸ If the new party is a necessary plaintiff, he can, if he wishes, come into the case by the plaintiffs taking leave to amend their petition and joining with him in an amended petition or, if he will not consent to become a plaintiff, he may be joined as defendant and have his rights concluded by the judgment. In case he is co-obligee with the plaintiffs in a joint contract, it is not settled whether or not he can be brought in as a defendant, or made an involuntary plaintiff, though under our system it seems either course might be proper.

New parties defendant are made by the plaintiff by taking leave to amend and filing a pleading suing the old and new parties as defendants, making proper allegations to show the liability or interest of each. New parties defendant are made by the defendant, either by joining them in the original answer, or if that has been filed, by taking leave to amend and filing an amended original answer showing the connection of each new party with the case and asking for appropriate relief against him, or for the proper action of the court concerning him and his interests.

Whether a new party is made by the action of either the plaintiff or the defendant, he is entitled to citation and notice in the same manner as the original defendant and for the same length of time.

The statutes expressly provide for making the warrantor of the title of defendant sued in action of trespass to try title a party to the suit.⁶⁹ It has been held that the plaintiff in such a suit can also bring in his warrantor.⁷⁰ The real owner of the land may also be made a defendant.⁷¹

⁶⁸ Reagan v. Copeland, 78 Texas, 555, 14 S. W., 1031.

⁶⁹ Rev. Stats. 1895, art. 5252; Johns v. Hardin, 81 Texas, 40, 16 S. W., 623; Frey v. Railway Co., 86 Texas, 465, 25 S. W., 609.

⁷⁰ McCreary v. Douglass, 5 Texas Civ. App., 492.

⁷¹ Rev. Stats. 1895, art. 5252.

INTERVENORS.

Persons who have the proper connection with the subject matter of the suit but have not been joined, may come voluntarily into the case and submit themselves and their rights to the court for adjudication. Just what interest in the subject matter of the suit or in the thing litigated about will entitle one to do this is not so clearly settled as to make the question always easy of determination. Some aid will be derived by keeping in mind the difference between the subject matter proper of a suit,—that is, the rights claimed, the wrongs complained of, and the remedies sought on the one hand,—and the things in or about which these rights and wrongs for which remedies are sought are said to exist on the other. If the interest of the proposed intervenor is in the subject matter, the rule is almost universally recognized that he may intervene at any time, provided the intervention does not delay the suit. If he is interested merely in the thing and not in the particular rights, wrongs, and remedies which are being litigated, his right to intervene will be determined by the probable affect of the litigation on his asserted rights in the thing. If it seem likely that such rights will be affected prejudicially, he may intervene; if not, he will not be permitted to do so.⁷²

The authorities seem to support the following rules as to the right to intervene.

First.—Whenever the person seeking to intervene is a necessary party to the main issue in the case, he may intervene at any time.

Second.—Whenever he is a proper party to the main issue in the case, he may intervene, unless he has been guilty of laches in asserting his rights, and his intervention at the time it is proposed would unduly delay or otherwise prejudicially affect the litigation between the original parties.

Third.—Whenever he is a proper party to the main issue and a necessary party to some subordinate issue which the parties are seeking to determine, he may intervene at any time while such subordinate issue is still pending and before the trial has begun. If upon his suggestion of intervention, the parties should abandon the issue as to which he was a necessary party, he would then fall under rule second above and his rights would be determined thereby.

Fourth.—If he is not in any way interested in the rights asserted by the plaintiff, nor in any way responsible for the wrongs charged against the defendant, but asserts some claim upon or title to the thing about which the litigation is pending, his right to in-

⁷² For general discussion see *Whitman v. Willis*, 51 Texas, 421; *Noyes v. Brown*, 75 Texas, 461, 13 S. W., 36; *Stansell v. Fleming*, 81 Texas, 297, 26 S. W., 1033.

tervene will depend upon the nature of the litigation and of his asserted rights in the thing. Unless these are such that the prosecution of the suit, or judgment sought, or the enforcement of such judgment will injuriously affect his right in the thing or his enjoyment of it, he can not intervene at all. If, however, he would be prejudicially affected by any one of these, his privilege of intervention is within the sound discretion of the court; if upon a consideration of all the facts alleged, it is apparent that to deny him the privilege would be injurious to him and that his coming in would not be prejudicial to the litigants, he will be permitted to intervene; if his coming in would delay the suit or otherwise interfere with the rights of the present parties, he will not be permitted to come in.

Manner of Intervening.

The person desiring to intervene must prepare and present to the court an appropriate pleading, setting out his interests in the suit and his reasons for intervening, accompanied by a motion to be allowed to intervene and file the pleading.⁷³ This motion should be in writing, but is frequently oral.

The pleading will be either a petition or an answer according to the circumstances of the case. If the party has mistaken his position on the docket and prepared one pleading when it should have been the other, the court may still look to the allegations of the pleading for the purpose of passing upon the motion to be allowed to intervene, and if they are found sufficient for that purpose the motion will be granted, the court, in its order, fixing the position of the parties and requiring pleadings to be filed conformable thereto. The order of the court granting leave to intervene is notice of the intervention to all parties then before the court.⁷⁴

The filing of the motion is usually considered sufficient notice of intervention to all parties actually before the court. If, however, any party is not actually before the court at the time, he must be notified or not, as the circumstances render proper. If the intervenor asserts rights adverse to those of such party and seeks relief against him, he must be duly cited as in case of other defendants; if the interests of the intervenor are not adverse and no relief is sought against the absent party, no notice is necessary. The intervenor must take the case as he finds it. He can not object to the reading of depositions

⁷³ *Eccles v. Hill*, 13 Texas, 67; *Caldwell v. Fraim*, 32 Texas, 325; *Ragland v. Wysrock*, 61 Texas, 397.

⁷⁴ *Bryan v. Lund*, 25 Texas, 98; *Fleming v. Seeligson*, 57 Texas, 533.

previously taken because he had no opportunity to cross-examine.⁷⁵ All previous orders and rulings are as binding on him as if he had been before the court when they were made. After a proper intervention, the rights of the intervenor can not be destroyed by a dismissal of his case by the plaintiff or by a settlement between the the plaintiff and defendant. Of course the intervenor can not prevent such action by the parties, but he can insist upon a trial and hearing all issues presented by him as the basis of affirmative relief, just as any other plaintiff, or a defendant presenting a cross action might.⁷⁶

Position of Intervenor in the Suit.

The position of the intervenor in the suit is determined by the court in accordance with the particular facts. If he is an actor seeking to enforce rights and to obtain affirmative relief, he will be a plaintiff and subject to all the rules of practice governing plaintiffs. His interests may be consistent with those of the original plaintiffs, as in case of suit by one cotenant of land for the benefit of all the co-owners, where the other co-owners subsequently intervene. Here the parties would co-operate just as if all had originally brought suit. Or his interests may be averse to those of the original plaintiffs,—that is, he may assert some interest in the matter being litigated adverse to the interests of the original plaintiffs and at the same time adverse to those of the defendants. An illustration of this is seen in a suit by an alleged pledgee of a promissory note, seeking to enforce payment from the debtor, where the alleged pledgor intervenes, denying the pledge and seeking a judgment against the defendant. Here the intervenor is interested adversely to both plaintiff and defendant. Again, the interests of the intervenor may be identical with those of the original defendants, as in case of trespass to try title brought against the tenant in possession and subsequent intervention by the landlord.

Each case is to be determined by its own facts. It is not material by what name the intervenor is designated; so far as he sets up rights in himself and seeks affirmative relief, the courts will apply to him the rules governing plaintiffs; so far as he simply resists the alleged rights of others, he will be governed by rules applicable to defendants.

⁷⁵ *Rainbolt v. March*, 52 Texas, 250.

⁷⁶ *State v. Loan & Trust Co.*, 81 Texas, 546, 17 S. W., 60.

CHAPTER X.

VENUE.

GENERAL PRINCIPLES.

Venue means locality or neighborhood, and is used in this sense in several different connections in the law. It originally indicated the neighborhood and then the county from which the jury was to be taken to try a case. In early times the competency of jurors turned upon their acquaintance with the case—just the reverse of the idea which now obtains. The law undertook to get upon the panel those persons most familiar with the transaction to be investigated. Under these circumstances, the place of the trial was determined by the convenience of the persons so selected. This principle no longer applies, and now the effort of the law is to obtain jurors who are entirely unacquainted with the subject matter of the litigation, and whose conclusions and verdict will be based exclusively upon the testimony of the witnesses. The fact that any person is a witness or has information qualifying him to be a witness in the case, or has formed or expressed an opinion upon the matter of the suit, is ground for his challenge. Still the term venue is used to indicate the locality or county in which a trial may be forced; that is, the county in which the plaintiff has the legal right to institute and maintain his suit, notwithstanding the defendant's objections.

Venue must be distinguished from territorial jurisdiction proper; the former has to do with privileges of the parties; the latter with the potential jurisdiction of the court. If the sovereign should, in dividing jurisdiction among the several tribunals created by it, do so upon the basis of locality, and should give to each of its courts power only to hear suits involving causes of action arising within certain territory, or in which persons resident within certain territory are parties, or in which only questions concerning things situated within certain territory are at issue, the potential jurisdiction of such courts would depend upon locality; and consent of parties could give no power or authority to any such court to try a case not within the territory specified by law. Venue is very different; it relates exclusively to the locality within which the active jurisdiction of the court may be exercised over the defendant against his will. If the sovereign creates a number of different courts of concurrent potential jurisdiction, and then for convenience of the litigants or from other considerations of public policy selects from among these courts one or more which shall have preference

in the exercise of the jurisdiction conferred, and in which alone unwilling defendants can be compelled to litigate their rights, basing the selection on the location of the court selected, this would fix the venue of such suits in such selected courts. It would not, however, affect the potential jurisdiction of the other courts not thus selected. It would be very inconvenient to have every defendant subject to suit in any court anywhere in the State, without allowing him any choice in the premises; and the law has determined that in most instances suits can be instituted and maintained in only one court, unless he shall consent expressly or impliedly to be sued in another.

GENERAL POLICY OF OUR STATUTES.

In almost every instance, though not in all, venue is fixed by statute. The first act of the Republic¹ on this subject, in its fifth section, announced the rule which has ever since obtained. "No person shall be sued out of the county in which he may reside;" and followed this with nine exceptions. These exceptions have all been retained---some of them with material enlargement of their scope; and numerous others have been added, so that under our present statute we have twenty-six. Several laws on other subjects make provision for venue of suits referred to in them; and the last section in the present statute enacts that, in all such cases, the provisions of the particular law shall control. The first amendment of the act of 1836, made in 1846, was entitled, "An act to regulate proceedings in the district courts."² This retained the same general policy, and increased the exceptions to eleven. The next act was passed in 1863.³ This added no new exceptions, but enlarged several of those existing. Afterward several laws were passed from time to time fixing venue in specified cases.

In 1879 the codifiers took up the whole subject, revised and combined all the acts, materially changed the language of a number of the sections, and added eleven other exceptions.⁴ Again acts regarding particular kinds of cases were passed from time to time. In the revision of 1895, the statute was put in its present form. Several changes were made in the language of Act of 1879, and three new sections were added.⁵

¹ An Act Establishing the Jurisdiction and Powers of the District Court, Approved Dec. 22, 1836; Laws First Con., p. 200; Laws of Texas, Gammel, vol. 1, 1258.

² Laws of 1846, 363; Hart. Dig., art. 667; O. & W. Dig., art. 401; Laws of Texas, Gammel, 1669.

³ Laws 1863, 10; Pasch. Dig., art. 1623; Laws of Texas, Gammel, vol. 5, 664.

⁴ Rev. Stats. 1879, art. 1198.

⁵ Rev. Stats. 1895, art. 1194.

As previously stated, the general policy of the statute is, that every inhabitant of the State should be sued in the county of his residence; and this is the rule in all cases against such persons in which no express provision is made to the contrary.

The statute makes no provisions with reference to ordinary suits in which all parties are nonresidents of the State, and in such cases the general doctrines of the common law and of comity between different nations must be looked to for guidance. In *Pegram v. Owens*, decided in 1885,⁶ it was held that in a transitory action, with reference to a subject matter over which potential jurisdiction had been granted to the district courts, and all parties to which were nonresidents of the State, jurisdiction could be exercised by the district court of any county in which service could be obtained on the defendant, or where he might appear and waive service.⁷

From this case it is clear that where potential jurisdiction is granted to a class of courts in transitory actions, and venue is not fixed in any one of such courts, suit may be maintained in any of such courts by which active jurisdiction over the person can be acquired. If the case is local in its nature, it would seem that this difficulty would hardly arise; for if its location were out of Texas, our courts would have no jurisdiction; if it were within the State, then it would fall under some of the provisions of the statute.

GENERAL RULES OF CONSTRUCTION OF THE STATUTE.

It has been held that the general purpose of our statute with reference to venue is to secure to the inhabitants of the State the privilege of being sued in the counties of their domicile, and that, therefore, the statute will be liberally construed to effect this purpose. In other regards it is to be construed as other statutes.⁸

The language of the statute announcing the general rule as to venue and of many of the sections providing exceptions would, ordinarily speaking, be regarded as mandatory; but the disposition of the authorities is to consider it as directory and its provisions as merely creating a privilege in the defendant. Even in those clauses in which the requirement is positive, using the phrase "must be brought" in a certain county, the courts have held, and properly, that this language does not affect the jurisdiction of other courts, and that unless the de-

⁶ 64 Texas, 475.

⁷ See also *Ward v. Lathrop*, 11 Texas, 287; *Ward v. Lathrop*, 4 Texas, 180; *McMullen v. Guest*, 6 Texas, 279; *Campbell v. Willson*, 6 Texas, 391; *Tulane v. McKee*, 10 Texas, 336.

⁸ *Finch v. Edmondson*, 9 Texas, 504.

fendant sets up his privilege of being sued in the county designated by proper plea, it is waived.⁹

Different forms of expression are used in different clauses of the statute; in some it is said that the suit must be brought in a certain county; in others, that it may be brought in any one of several counties; furthermore suits not infrequently arise in which different sections of the statute apply. The rule seems to be that if the statute provides that a certain kind of suit must be brought in a certain county, the defendant can by proper plea compel the plaintiff to sue in the designated county; but where the statute gives the plaintiff the right to choose between several counties, the defendant can not interfere with the selection the plaintiff may make.¹⁰

Certain sections of the statute provide that suits against specified classes of defendants may be brought in designated counties, and other sections that suits of specified kinds may be brought in designated counties. It not infrequently happens that a defendant coming within the former sections is sued in a case falling within the latter. In such conditions the practice does not seem to be settled.

The Supreme Court has held that the venue may be laid in either county which the plaintiff may elect,¹¹ and the Court of Appeals at Fort Worth has held that the defendant may, by setting up his privilege at the proper time, compel the plaintiff to litigate in the county designated in the sections regarding the kinds of suits.¹²

GENERAL RULE AS TO VENUE.

The first clause of the present statute is in these words: "No person who is an inhabitant of this State shall be sued out of the county where he has his domicile." As stated above, this language seems to be mandatory, but it is not so construed, and is held merely to confer a privilege upon the defendant to be sued in the county in which he resides, and that this privilege may be waived by him, either affirmatively by express agreement, or negatively by failing to assert his right at proper time.

The word person includes both natural and artificial persons. The words inhabitants and domicile have been construed in a liberal rather than a technical sense; the latter has been held in several cases to be

* Ryan v. Jackson, 11 Texas, 400; Morris v. Runnels, 12 Texas, 175; Cavanaugh v. Peterson, 47 Texas, 206; De la Vega v. League, 64 Texas, 205; Bonner v. Hearne, 75 Texas, 247, 12 S. W., 38.

¹⁰ Carro v. Carro, 60 Texas, 395.

¹¹ Railway Co. v. Horne, 69 Texas, 646, 9 S. W., 440.

¹² Railway Co. v. Jenkins, 29 S. W., 1113.

equivalent to residence, so that the nice distinctions between those terms do not apply in this connection.¹³

Venue is fixed by the defendant's residence at the time the suit is instituted; not at the time of service or of trial.¹⁴ When it is doubtful in which of two counties the defendant resides, he may be sued in either.¹⁵ If, however, the defendant has changed his residence and the removal is completed at the time of the institution of the suit, he can not be compelled to litigate in the county in which he formerly resided.¹⁶

EXCEPTIONS TO RULE.

Suits Against Married Women.

The first exception made in the statute is to the effect that where the defendant is a married woman she may be sued in the county in which her husband has his domicile. This statute follows the general doctrine of the law that the domicile of the wife is determined by that of her husband.

Against Transient Persons.

The second exception is: "Where the defendant is a transient person, in which case he may be sued in any county in which he may be found."

The term transient person has not been frequently defined by the courts. The Supreme Court of Vermont, in *Middlebury v. Waltham*,¹⁷ says that a transient person is "Not exactly a person on a journey from one known place to another, but rather a wanderer ever on the tramp." Mr. Sayles, in his work on Practice,¹⁸ says: "A transient person is one who has no fixed residence within the State; as every person in legal contemplation has a domicile somewhere and can have but one at any given time, it would seem to follow that a transient person is a non-

¹³ *Tucker v. Anderson*, 27 Texas, 281; *Brown v. Bouldin*, 18 Texas, 433; *Giddings v. Steele*, 28 Texas, 751; *O'Conner v. Cook*, 26 S. W., 1114; *Ex Parte Blumer*, 27 Texas, 738; *Russell v. Randolph*, 11 Texas, 465; *State v. Skidmore*, 5 Texas, 469.

¹⁴ *Whiting v. Briscoe*, *Dallam*, 540.

¹⁵ *Faires v. Young*, 69 Texas, 483, 6 S. W., 800.

¹⁶ *Faires v. Young*, *supra*; *Walker v. Walker*, 22 Texas, 331.

¹⁷ 6 Ver., 203.

¹⁸ Vol. I, sec. 222.

resident of the State temporarily residing within the State. He is not a person whose residence is simply unknown to the plaintiff." It is clear that a nonresident of the State temporarily residing within the State would be a transient person, but it is not equally clear that such non-residents include all persons who are transients, within the meaning of this law. If domicile in the first clause of this article means residence, as has been held by the courts, and the general purpose of the law is to fix the venue of suits in the counties where the defendants reside, it would seem to follow that residence, rather than domicile in the technical use of that term, was the thought in the legislative mind; and that this exception was intended to cover all cases in which the defendant is within the State, but has no fixed residence therein, whether or not he had such residence elsewhere,—the intention being to prevent the attempted privilege of the defendant from working real hardship upon the plaintiff by requiring him to determine in advance where the residence of the defendant is, when his conduct had been and was still such as to render this difficult of solution. It would seem, therefore, that a transient person is one who has neither domicile nor fixed residence within this State, or who is so migratory in his habits of life that it is difficult to determine where his actual residence is. It would not ordinarily tend to the inconvenience of such an one to sue him at any place where the plaintiff might conclude he resided; and therefore, making him liable to suit wherever he may be found does not interfere with the general policy of the statute as to convenience of the defendant.

Against Nonresident Defendants and Defendants Whose Residence is Unknown.

The third section of the statute is. "Where the defendants or all of several defendants reside without the State, or where the residence of the defendants is unknown, in which case the suit may be brought in the county where the plaintiff resides." It will be observed that this section deals with two classes of persons,—those whose residence is known but who are without the State of Texas; second, those whose residence is unknown whether it be within or without the State.

As to the first of these classes this section can hardly be called an exception to the general rule announced in the first clause of the statute with regard to inhabitants of this State, but as it is so dealt with in the statute it is more convenient to adopt that method of treatment.

It will be noted that in each of these cases venue is fixed by the residence of the plaintiff.

In cases against nonresidents who are temporarily within the State and are duly served, or who voluntarily appear whether within the

State or not, this clause is operative; but if the defendant be a non-resident and actually without the State and declines to accept service or otherwise enter an appearance, and has no property in the State, the statute is without force, as there would be no way in which to obtain service necessary to a personal action and the circumstances would not admit of a proceeding *in rem* or *quasi in rem*. If the defendant has property within the State, a proceeding *quasi in rem* may be brought, and the property be subjected to the jurisdiction of the court by taking it into the custody of the court. In such cases, venue could be fixed by this statute, though it is usual for the venue to be laid in that county in which the property or a part of it is situated.¹⁹

As to the second class, defendants residing in this State and subjects to its laws, but whose residences are unknown to the plaintiff, the statute is effective, and such persons may be sued in the county in which the plaintiff resides. At an early date it was held that if the defendant's residence was unknown to the plaintiff at the time the suit was instituted, his right to sue in the county of his own residence would not be defeated by his subsequently obtaining information as to where the defendant resided.²⁰

In a late case²¹ the Court of Civil Appeals for the Fifth District holds that in a suit against a defendant whose residence is unknown, where service is obtained by publication and the defendant enters an appearance and pleads in abatement that at the date the suit was instituted he resided in another county within the State of Texas, this will not defeat the plaintiff's privilege to sue him as one whose residence is unknown, unless the defendant proves that in fact he did live at the place designated in his plea and that the plaintiff did really know the place of his residence at the time the suit was brought. Consideration will be given to this case when we take up the subject of proper practice in these matters.

Against Two or More Defendants Residing in Different Counties.

The fourth exception is in these words: "Where there are two or more defendants residing in different counties, in which case the suit may be brought in any county where any one of the defendants resides." This is but a continuation of the policy announced in the general rule. It is impossible under the conditions mentioned to accommodate all the defendants by suit within their respective counties, and hence the prin-

¹⁹ *Mickie v. McGehee*, 27 Texas, 138; *Liles v. Woods & Co.*, 58 Texas, 417, and cases cited *infra*.

²⁰ *Whiting v. Briscoe*, Dallam, 540; *Walker v. Walker*, 22 Texas, 331.

²¹ *Hopson v. Caswell*, 36 S. W., 312.

ciple is applied as far as may be, and the plaintiff is required to sue in the county in which some one or more of the defendants resides.

This clause, however, can not be perverted and made the means of defeating the general policy of the statute by joining improper parties or fraudulently bringing about a state of facts for the purpose of making new parties, so as to give venue. That is, a party having a cause of action can not join as a party defendant in the suit a resident of the county in which he desires to fix the venue, who is not, under the general rules of law, either a necessary or a proper party; nor can he, by assignment of his cause of action for the purpose of fixing venue, have himself sued as a party defendant and bring the persons primarily liable to him within the county of his residence as codefendants, and then seek to recover against them by affirmative pleadings on his own part. On the other hand, the plaintiff may fix the venue of his suit by the residence of any one of the defendants, who is a *bona fide* necessary or a proper party to the suit, and the inconvenience arising therefrom to the codefendants could not be considered by the court, but persons not really necessary or proper can not be joined for the purpose of giving venue.²²

If the residence of some of the defendants is known and that of the others is unknown, it has been held by the Court of Appeals that the suit must be brought in the county of the residence of some one of the former.²³

Where two defendants are properly joined in the suit and the venue fixed by the residence of one, and pending the litigation the resident defendant dies and the suit is dismissed as to his representative, this does not affect the jurisdiction as to the other defendants and the court should proceed with the trial.²⁴

The residence of a domestic corporation is in the county in which it maintains its principal office. Under circumstances specified in other clauses of this statute, many suits may be brought against such a cor-

²² *Randon v. Barton*, 4 Texas, 292; *Henderson v. Kissam*, 8 Texas, 48; *Poole v. Pickett*, 8 Texas, 123; *Raymond v. Holmes*, 11 Texas, 58; *Roan v. Raymond*, 15 Texas, 86; *Christy v. Gunter*, 26 Texas, 700; *Holloway v. Blum*, 60 Texas, 625; *Rush v. Bishop*, 60 Texas, 177; *Railway Co. v. Mangum*, 68 Texas, 342, 8 S. W., 617; *Blum v. Strong*, 71 Texas, 321, 6 S. W., 167; *Graves v. Bank*, 77 Texas, 555, 14 S. W., 163; *Mathonican v. Scott*, 87 Texas, 398, 28 S. W., 1063; *Brigham v. Thompson*, 12 Texas Civ. App., 562, 34 S. W., 358; *Edwards v. Buchanan*, 14 Texas Civ. App., 268, 36 S. W., 1025; *Anderson v. Bank*, 86 Texas, 619, 28 S. W., 344; *Williams v. Bank*, 27 S. W., 148; *Cleveland v. Campbell*, 38 S. W., 219; *Mathis v. Pridom*, 1 Texas Civ. App., 81, 20 S. W., 1015; *Jones v. Austin*, 6 Texas Civ. App., 505, 26 S. W., 144; *Gibbs v. Petree*, 7 Texas Civ. App., 532, 27 S. W., 685.

²³ *Claiborne v. Pickens*, 4 Willson's C. C., sec. 117.

²⁴ *Lewis v. Davidson*, 51 Texas, 256.

poration in counties other than that in which its principal office is kept. It has been held that such suits are not brought in the county of the corporation's residence, consequently venue against another defendant not residing in the county of such suit can not be fixed by this clause of the statute.²⁵

Venue Fixed by Contract.

The fifth exception is: "Where a person has contracted in writing to perform an obligation in any particular county, in which case suit may be brought either in such county or where the defendant has his domicile."

This exception embraces only written contracts, and a parol agreement to perform a contract at any designated place can not affect the venue of a suit brought on the agreement. This section embraces all actions growing directly out of the breach of the contract.²⁶

If the plaintiff allege that the contract is payable in the county where the suit is brought and thus fixes the venue, and the defendant offers no plea in abatement, the jurisdiction of the court will not be affected by the failure to prove the contract as laid.²⁷

Against Executors, Administrators, or Guardians.

The sixth exception is: "Where the suit is against an administrator, executor or guardian, as such, to establish a money demand against the estate which he represents, in which case the suit must be brought in the county in which such estate is administered." This statute in its present form, embraces only suits against an executor, administrator, or guardian in his fiduciary capacity in which it is sought to establish a moneyed demand against the estate. The former statute was very much more comprehensive, embracing trustees, as well as the parties enumerated above, and having no limitations with reference to the nature of the demand. This must be borne in mind, or the earlier cases will be misleading.

This statute does not apply to suits against the administrator or his bondsmen by the distributees or parties interested in the estate for waste or maladministration.²⁸

²⁵ *Railway Co. v. Blount*, 3 Texas Civ. App., 282, 22 S. W., 930.

²⁶ *Middlebrook v. Mfg. Co.*, 86 Texas, 706, 26 S. W., 935. *Contra*: *Yeager v. Focke*, 6 Texas Civ. App., 542, 25 S. W., 652; *Altgelt v. Harris*, 11 S. W., 857.

²⁷ *Wilson v. Adams*, 15 Texas, 326.

²⁸ *Bodies v. Buford*, 58 Texas, 269.

For Fraud and Defalcation of Public Officers.

"In all cases of fraud, and in cases of defalcation of public officers, in which case suit may be instituted in the county in which the fraud was committed, or where the defalcation occurred, or where the defendant has his domicile."

The term fraud as used in this statute includes both actual and constructive fraud.²⁹ The fraud must constitute the principal cause of action, or the suit must be brought to set aside some fraudulent act or transaction in order to give venue. That an issue of fraud arises incidentally or in connection with some other matter which is the real basis of the suit is not sufficient.³⁰ The action for defalcation by an officer referred to here is the ordinary civil action for damages for official misconduct,³¹ and must be distinguished from the summary remedy by motion against a sheriff for failure to pay over money collected on process, which must be made in the court from which the process issued.³²

For Damages in Attachment and Sequestration.

"Any suit for damages growing out of the suing out of any writ of attachment or sequestration, or for the levy of any such writ, may be brought in any county from which such writ was issued, or in any county where such levy was made, in whole or in part, within this State."

This clause was added to the statute in 1889.³³

Prior to that time venue had sometimes been laid in the county in which the writ had been issued, sometimes in that in which the levy had been made,—as the one or the other constituted "a trespass" under the ninth clause of the present statute.³⁴

²⁹ *Evans v. Mills*, 16 Texas, 200; *Boothe v. Fiest*, 80 Texas, 141, 15 S. W., 799.

³⁰ *Freeman v. Kuechler*, 45 Texas, 597; *Hilliard v. Wilson & Blum*, 65 Texas, 287; *Blum v. Strong*, 71 Texas, 321, 6 S. W., 167; *Baines v. Mansing*, 75 Texas, 200, 12 S. W., 984.

³¹ *De la Garza v. Booth*, 28 Texas, 481.

³² *Rev. Stats. 1895*, art. 1100; *De Witt v. Dunn*, 15 Texas, 106; *Beaver v. Batte*, 19 Texas, 111; *De la Garza v. Booth*, 28 Texas, 478.

³³ *Acts 1889*, p. 48.

³⁴ *Cahn Bros. v. Bonnett*, 62 Texas, 674; *Hilliard v. Wilson*, 65 Texas, 287; *Willis & Bro. v. McNatt & March*, 75 Texas, 69, 13 S. W., 478; *Focke v. Blum*, 82 Texas, 436, 17 S. W., 770; *Baines v. Jemison*, 86 Texas, 118, 23 S. W., 639.

For Crime, Offense, or Trespass.

"Where the foundation of the suit is some crime, offense, or trespass, for which a civil action in damages may lie, in which case the suit may be brought in the county where such crime, or offense, or trespass was committed, or in the county where the defendant has his domicile."

In the original practice act of 1836³⁵ the words "crime" and "offense" occurred, but "trespass" did not. In construing the statute, the courts held the terms crime and offense to be legally synonymous and limited the exception provided by the clause to acts which were in violation of the criminal law.³⁶

The same language was used in the act of 1846,³⁷ and was construed in the same way.³⁸

This act was amended by that of December 10, 1863.³⁹ in which the word trespass was added. The language of this clause has not been changed since. The meaning of the word trespass has frequently been considered by the courts and the conclusion has been reached that it is not to be interpreted strictly or technically, but liberally. In *Hill v. Kimball*,⁴⁰ the Supreme Court says: "It is clear that unless the action in this case can be classed as a trespass within the meaning of that term in the provision quoted, the suit was improperly brought in Leon County; and the determination of that point depends upon the further question whether the word is used in the statute in its most restricted or in a more enlarged legal sense. In its widest signification it means any violation of law; in its most restricted sense it means an injury intentionally inflicted by force, either upon the person or property of another. But it still has a signification in law much more narrow than the first, and more enlarged than the second meaning given, and embraces all cases where injury is done to the person or to property, and is the direct result of wrongful force."

"In this last sense the word would include injuries to persons or property which are the result of the negligence of the wrongdoer, and it seems to us more in consonance with the purpose and spirit of the exception to hold that it was in this sense that it was intended that the word should be understood. We presume the exception was made in the interest of the injured party, and not of the wrongdoer, and we

³⁵ Acts 1836, p. 200.

³⁶ *Illies v. Knight*, 3 Texas, 312.

³⁷ Acts 1846, p. 363.

³⁸ *Robertson v. Ephraim*, 18 Texas, 118.

³⁹ Acts 1863.

⁴⁰ *Hill v. Kimball*, 76 Texas, 210, 13 S. W., 59.

see no good reason why a distinction should be made between an injury resulting from intentional violence and one resulting from negligence. It occurs to us the consideration which induced the exception was that one who had been injured in his person or his property by the wrongful or negligent conduct of another, should not be driven to a distant forum to get redress of his wrongs.

"In the case of *Ten Eyck v. Rank*, 31 N. J. L., 428, the Supreme Court of New Jersey construed the word 'trespass' as used in a statute of that State as descriptive of a class of actions, and held that it was not used in its most restricted sense, but applied also to all actions of trespass in the case. See also *Cook v. Hartman*, 2 W. & W. C. C., 770.

"If, as we think, the word trespass in our statute was intended to embrace not only actions of trespass proper as known to the common law, but also actions of trespass on the case, it is clear that the action in this case was properly brought in Freestone County, and that the court had jurisdiction over the person of the defendant."

In the latter case of *Ricker et al. v. Shoemaker*,⁴¹ the proper meaning of the word trespass again came up for decision, and the court qualified the language just quoted, saying: "The construction of the word 'trespass' in that provision of the statute came before us for consideration in the case of *Hill v. Kimball*, and we there held that the word was not used in its most restricted sense, and as applying only to actions for injuries inflicted by force upon the person or property of another, but that it would embrace actions of trespass on the case as known to the common law. In the case cited the alleged wrong consisted in a bloody assault by the defendant upon two negroes in the presence of the plaintiff's wife, and it was averred that by reason of the mental excitement of the wife caused by the defendant's conduct, a miscarriage resulted. It was held that the cause of action was a trespass within the meaning of the statute, and the suit was properly brought in the county where the trespass was committed. Between that and the case now under consideration there is a marked distinction. There the act was not alleged to be done with the intent to injure plaintiff's wife, but it was an act committed. In the present case, the alleged wrong consists in the negligent omission by the defendant's representative to do an act which it was his duty to do. Is this a 'trespass' within the meaning of the statute? We think not. The words 'when the crime, offense, or trespass was committed' indicate that the word trespass was intended to embrace only actions for such injuries as result from wrongful acts willfully or negligently committed, and not those which result from a mere omission to do a duty. There are expressions in the case of *Hill v. Kimball*, *supra*, which

⁴¹ *Ricker v. Shoemaker*, 81 Texas, 25, 16 S. W., 645.

would tend to give to the exception in the statute we are now considering a wider scope; but when that case was under consideration the distinction we now draw did not present itself to our minds." This case has been adhered to since without question.⁴²

In other cases in which there was no question that trespasses had been committed it was sometimes difficult to determine in just what acts they consisted and where they took place and who was responsible for them.

These difficulties arose principally in cases of malicious prosecution, abuse of legal process and acts committed by executive officers in the supposed discharge of duty.

The Act of 1889, adding the clause regarding suits for damage for wrongful suing out and levy of writs of attachment or sequestration, has settled these difficulties as to those writs and action under them. It however leaves the law as to all other trespasses just as before.

The rules seem to be these. If the process is properly issued and the act of the officer is in strict accord with it there is no trespass and no liability, and the suit against the officer could not be maintained either as to venue or on the merits. If, however, the process is proper but the officer does something under it not authorized thereby, he is a trespasser. This trespass may consist in willfully levying on more property than is required by the writ or on different property from that commanded in the writ as in an order of sale, describing specific property, or in levying on property not belonging to the defendant in the writ, or on property belonging to the defendant but exempt from execution, or in willfully or negligently arresting a different person from the one named in the warrant, or in purposely or negligently damaging or sacrificing the goods levied on,⁴³ or in any other abuse of process.⁴⁴

In all such cases the trespass is committed where the wrongful act is done, and suit may be brought there against the officer and all persons aiding or participating in the trespass.

In these cases the plaintiff in the civil suit or the prosecuting witness in the criminal case is not a party to the wrong simply by having had the process issued; to make him responsible there must be some evidence of his participation in the abuse of the writ.

On the other hand, if the litigation in which the process was issued though in strict form of law, were wrongfully and maliciously prosecuted, the execution of the writ in conformity to its commands could not be a trespass on the part of the officer, unless he were a party to the

⁴² Connor v. Saunders, 81 Texas, 633, 17 S. W., 236; Austin v. Cameron, 83 Texas, 351, 18 S. W., 437; Conner v. Saunders, 9 Texas Civ. App., 86, 29 S. W., 1142.

⁴³ Hilliard v. Wilson, 65 Texas, 289.

⁴⁴ Carothers v. McIlhenney, 63 Texas, 147.

wrongful prosecution of the suit. The process would be lawful on its face, and the officer could not be required to judge at his peril of the motives and purposes of the prosecutor. This is certainly correct in principle and supported by authority. Our courts have established a rule which, in my judgment, goes further than the principle on which it is said to be founded. They say that the levy under circumstances given above is not a trespass by the instigator of the wrongful suit, and that he can not be sued in the county in which the arrest is made. It seems to me clear that, as the unlawful arrest or levy of the process was clearly contemplated by the party in originating the suit, was indeed his principal purpose in so doing, that he, the instigator, should be regarded as committing a trespass through the sheriff, whom he had thus improperly forced to execute the process. The sheriff, of course, is not responsible, for he has committed no unlawful act, but he who knowingly made use of the process to accomplish his own unlawful and malicious purposes I think should be. However that may be, it seems to be settled to the contrary in our decisions, and we may accept it as the rule on question of venue in these suits, that in cases of unlawful procurement of legal process, regular on its face, the subsequent execution of such process by the officer to whom directed in another county will not fix the venue there. If, however, the party instituting the malicious prosecution is present in person, or by agent other than the officer, and participates in such execution, he may be sued there.⁴⁵

In suits for libel, if the publication be of such character as to come within the terms of our criminal statute,⁴⁶ it would be a crime, and the case could be brought in any county in which the statement was published or circulated.⁴⁷

If the publication did not come within the definition of the crime of libel, this section would not apply. In cases of slander, the same rules would doubtless govern.

For Personal Property.

"Where the suit is for the recovery of any personal property, in which case the suit may be brought in any county in which the property may be, or in which the defendant resides."

This needs no elucidation.

⁴⁵ Hubbard v. Lord, 59 Texas, 384; Raleigh v. Cook, 60 Texas, 440; Carothers v. McIlhenney, 63 Texas, 141; Hilliard v. Blum, 65 Texas, 290.

⁴⁶ Penal Code, title 16, chap. 1.

⁴⁷ Belo & Co. v. Wren, 63 Texas, 720.

Concerning Inheritance.

"Where the defendant has inherited an estate, concerning which the suit is commenced, in which case suit may be brought in the county where such estate principally lies."

I have found no cases construing this or the next preceding section.

To Foreclose Mortgages.

"Where the suit is for the foreclosure of a mortgage or other lien, in which case the suit may be brought in the county in which the property subject to such lien or a portion thereof may be situated."

As first enacted, this statute applied only to foreclosure of mortgages.⁴⁸ In the act of 1863 the clause was extended to include all liens, whether technically mortgages or not.⁴⁹ The courts have recognized the difference and have applied it to vendor's liens⁵⁰ and to liens of contractors on the roadbed of a railroad company.⁵¹

For Partition.

"Suits for the partition of lands or other property may be brought in the county where such lands or a part thereof may be, or in the county in which one or more of the defendants reside."

Where the suit is strictly one for partition and all the parties are interested in all the lands, the statute is easy of application, and the plaintiff has the option of suing where the land or any part of it lies or where any one of the defendants resides.

Where there are two or more tracts of land claimed by the plaintiff as part of the same estate, and some of the defendants are interested in all of the land and others only in one particular tract, suit may be brought against all the defendants in the county where part of the land lies, or in the county of the residence of the defendants who are interested in it all, but not in the county of the residence of those defendants interested in only a part. Disregard of the concluding portion of this rule will be fatal to the plaintiff's suit, if urged in proper time and manner.⁵² Where the plaintiffs claim undivided interests in

⁴⁸ O. & W. Dig., 401; *Coffee v. Haynes*, 24 Texas, 191.

⁴⁹ Pasch. Dig., art. 1422; *Hays v. Stone*, 36 Texas, 186.

⁵⁰ *Joiner v. Perkins*, 59 Texas, 303.

⁵¹ *Railway Co. v. Cockrill*, 72 Texas, 613, 10 S. W., 702.

⁵² *Osborn v. Osborn*, 62 Texas, 496.

different tracts in different counties, but the cotenants with the plaintiffs in the different tracts are different, suits for partition of the tracts should be brought separately, the venue in each case being fixed by the facts regarding the land to be affected by the judgment.⁵³ Suit to partition and to foreclose a lien on the interest of a cotenant to be set apart to him is properly brought in the county where the land lies, though the defendant may live elsewhere.⁵⁴ It seems, though the case announcing the doctrine is somewhat obscure, that if the venue is properly fixed by the proceedings for partition, the court may properly adjudge matters in the nature of specific performance of a contract for conveyance of title, though the defendants reside in a different county and set up their privilege.⁵⁵ While it is permissible to join suit for partition with an action of trespass to try title, in such a case the venue is regulated by the clause of the statute regarding the latter action.⁵⁶

Suits Concerning Lands.

"Suits for the recovery of land or damages thereto, suits to remove incumbrances upon the title to land, and suits to prevent or stay waste on land, must be brought in the county in which the land or a part thereof may lie."

To properly understand this section of the statute, it is necessary to bear in mind the several changes in the law made by the different statutes on the subject. In the Act of 1836,⁵⁷ the exception was expressed in these words,—“in cases where land is the object of the suit.” In the Act of 1846⁵⁸ the language is,—“in cases where the recovery of land or damages thereto is the object of the suit, in which cases the suit must be instituted where the land or a part thereof is situated.” This section was not amended in 1863.⁵⁹ In the revision of 1879, it was put in its present form, the amendment consisting in the addition to the old clause of the words “suits to remove incumbrances upon title to land, suits to quiet title to land, and suits to prevent or stay waste upon land.” The revision of 1895 left the section unchanged.

⁵³ *Peterson v. Fowler*, 73 Texas, 524, 11 S. W., 534.

⁵⁴ *Morris v. Nunn*, 79 Texas, 125, 15 S. W., 220.

⁵⁵ *Coryell v. Lintheum*, 11 S. W., 1092.

⁵⁶ *Stark v. Burr*, 56 Texas, 131; *Murrell v. Wright*, 78 Texas, 519, 15 S. W., 156.

⁵⁷ *Laws of Repub.*, vol 1, 198; *Laws of Texas*, Gammel, vol. 1, 1260.

⁵⁸ *Hart. Dig.*, art. 667; *O. & W. Dig.*, art. 401; *Laws of Texas*, Gammel, vol. 2, 1670.

⁵⁹ *Acts Tenth Leg.*, p. 10; *Pasch. Dig.*, art. 1423; *Laws of Texas*, Gammel, vol. 5, 665.

In *Morris v. Runnels*,⁶⁰ it was held that this section of the Act of 1846 did not embrace suits for the rescission of a contract relating to land; and in *Hearst v. Kuykendall*,⁶¹ it was decided that a suit for specific performance of a contract to convey land was not within the exception. The court says: "An action for the recovery of lands has a well known and definite signification, and means an action of ejectment, trespass to try title, or a suit to recover the land itself, but not one to enforce a contract for its sale, and the delivery of a deed or title for the land. * * * To secure title deeds to land is one thing; to recover the land itself is another; and as the former is generally and mainly the object of a suit by vendee for the specific performance of a contract for the sale of land, it is apparent that the action does not come within the scope of a provision, the operation of which is restricted to suits for the recovery of land." This construction was uniformly followed until the amendment of 1879 went into effect.⁶²

The difference in the exception made by that revision and its legal effect are very carefully considered in the case of *Thomson v. Locke*,⁶³ There this language is used: "An action for the recovery of lands has a well known and definite signification, and means an action of ejectment, trespass to try title, or suit to recover the land itself. *Hearst v. Kuykendall*, 16 Texas, 329.

"The 'recovery of land' manifestly has reference to the possession; and 'damage thereto' as manifestly has reference to an 'injury to the possession or to the freehold or estate.' *Miller v. Rusk*, 17 Texas, 171.

"It is not believed this is a 'suit to remove incumbrances upon the title to land.'

"The word 'incumbrance,' in a popular sense, might include an illegal claim set up to land, under such state of facts as would apparently give title, when in fact no title existed. Thus used it would be the equivalent of the words 'cloud upon title.' In a legal sense, the word 'incumbrance' means 'an estate, interest, or right in lands, diminishing their value to their general owner, a paramount right in or weight upon land which may lessen is value.' *Abbott's Law Dictionary*.

"It is claimed that one of the leading purposes of this suit is 'to quiet the title to land.' If this be true, then the suit was properly brought in Kinney County. A comparison of the law now in force with those formerly regulating venue, evidences the intention of the Legislature to fix the venue of cases, affecting the title to land, in the county in which the land may be situated, in cases in which this was not done by the former

⁶⁰ 12 Texas, 175.

⁶¹ 16 Texas, 329.

⁶² *Vendever v. Freeman*, 20 Texas, 336; *Miller v. Rusk*, 17 Texas, 171; *Lehmberg v. Biberstein*, 51 Texas, 462.

⁶³ 66 Texas, 386, 1 S. W., 112.

laws. All but the first clause of the statute which we have quoted, are additions to the Act of December 10, 1863, regulating venue. P. D., 1432.

“An examination of the several subdivisions of Revised Statutes, Article 1198, shows an intention on the part of the Legislature to require such actions as may affect or are brought to secure title, either legal or equitable, to land to be brought in the county in which the land is situated. The eleventh subdivision of the act of December 10, 1863, only required such actions as might be brought under the statutes regulating actions of trespass to try title to be brought in the county where the land was situated; while the law now in force requires actions to be brought in the county in which the land is situated which can not be brought and maintained as actions of trespass to try title. The evident intention was to provide the venue in all actions in which the title to land was in controversy; and so, whether the title sought to be enforced or protected was of such dignity as to authorize an action of trespass to try title, or of such inferior grade as not to entitle the holder of it to resort to and have all the statutory rights which pertain to that action.”

The expression in this section is that the suits referred to “must” be brought in the county where the land lies. It has been frequently decided that this is neither mandatory nor jurisdictional, but only gives to the party sued for the land the privilege of having the litigation conducted in the county where the land is. This privilege he waives by a failure to assert it at the proper time, and a disregard of the privilege when claimed would be error subjecting the judgment to revision, but would not make the judgment void.⁶⁴

Some complications have arisen over the provision as to part of the land, and the cases are not entirely clear as to the proper practice.

Where all the land is one tract through which a county line runs, and all the defendants are interested in or have possession of all the land, the case is simple. Venue may be laid in either county. Where all the land is one tract and it is divided by a county line, and the trespassers in the different counties are not the same persons and have no connection with each other, it seems that the venue would be in either county. All such persons are proper parties in the one suit and may be joined.

But a different rule applies when the tracts are distinct and separate and the defendants reside in different counties.

“The fact that the plaintiffs rely upon the same facts for the recovery of three distinct tracts of land, can not entitle them to main-

⁶⁴ Ryan v. Jackson, 11 Texas, 297; Morris v. Runnels, 12 Texas, 175; De la Vega v. League, 64 Texas, 205; Campbell v. Trimble, 75 Texas, 270, 12 S. W., 863.

tain this action for land situated in three counties and in no way connected, in the county in which one of the tracts is situated, unless such defendants as only claim land in other counties have waived their rights to be sued only in the county in which the land they claim is situated."⁶⁵

In suits to remove cloud from title in which there are many defendants one or more of them who are necessary parties may insist on the privilege of having the suit brought in the county where the land lies, and such right is not lost by waiver of the privilege by the other defendants. Abatement of the suit as to such necessary party would abate it as to all and necessitate the bringing of another suit in the proper county.⁶⁶ Doubtless the same rule would apply in each of the other cases mentioned in the statute.

In a suit of trespass to try title may be incorporated an attack upon a void judgment, and the venue is properly laid in the county where the land is situated.⁶⁷ This must be distinguished from an attack upon a judgment for reasons which merely render it voidable. This can only be done by direct proceeding brought in the county where the judgment was rendered. If the proceedings were in the justice court, it seems that the suit should be brought in the district court of the county in which the land lies.⁶⁸

On Warranty of Title to Land.

In breach of warranty of title to lands, where the vendors liable thereon live in different counties, the plaintiff may bring his action in the county where either of such vendors resides, and join all other warrantors in the same suit.⁶⁹ One may for breach of covenant of warranty sue his immediate warrantor and remote warrantors in the county where only the immediate warrantor lives; but the residence of the immediate warrantor will not permit the others being sued in the same action for breach of covenant of warranty of other land which they had not warranted.⁷⁰ In trespass to try title, defendant may implead his grantor on his warranty though the suit is in a county other than the grantor's residence.⁷¹

⁶⁵ *Martin v. Robinson*, 67 Texas, 382, 9 S. W., 134.

⁶⁶ *Russell v. Railway Co.*, 68 Texas, 650, 5 S. W., 686.

⁶⁷ *Bender v. Damon*, 72 Texas, 92, 9 S. W., 747.

⁶⁸ *Smith v. Perkins*, 81 Texas, 152, 16 S. W., 805.

⁶⁹ *Carothers v. Johnson*, 4 Willson's C. C., sec. 263.

⁷⁰ *Chaison v. Beauchamp*, 12 Texas Civ. App., 109, 34 S. W., 304.

⁷¹ *Meade v. Jones*, 13 Texas Civ. App., 320, 35 S. W., 310.

Suits for Divorce.

"Suits for divorce from the bonds of matrimony shall be brought in the county in which the plaintiff, whether husband or wife, shall have resided for six months next preceding the bringing of the suit."

The allegation that plaintiff is a *bona fide* citizen of a certain county in the State and has been for more than six months before the filing of the petition is not the equivalent of the statutory requirement, citizenship and residence not being the same in law.⁷²

The *bona fides* of plaintiff's residence depends upon whether such residence be taken up solely for the purpose of suing for a divorce or with the intention of making the county a permanent home.⁷³

Suits to Enjoin Judgments.

"When the suit is brought to enjoin the execution of a judgment or to stay proceedings in any suit, in which case the suit shall be brought in the county in which such judgment was rendered or in which such suit is pending."

The above article relates to injunction staying the judgment or process issued on it, which would prevent enforcement of the judgment or of the particular writ for some defect therein, and does not apply to an injunction restraining the sale of property claimed to be exempt from execution and not seeking to affect the judgment or the writ. Such an injunction may be granted and heard in the county where the land or other property levied on is situated.⁷⁴ Suits for damages upon an injunction bond may be brought in a county in which reside one or more of the defendants, although it be a county other than that in which the injunction suit was tried.⁷⁵

Suits to Revise Proceedings of the County Court.

"Suits to revise the proceedings of the county court in matters of probate must be brought in the district court of the county in which such proceedings were had."

The above does not conflict with the following: "The county court is the proper court in which to bring a proceeding to contest the validity of a paper admitted to probate as a will."⁷⁶

⁷² Haymond v. Haymond, 74 Texas, 414, 12 S. W., 90.

⁷³ Jones v. Jones, 60 Texas, 457.

⁷⁴ Van Ratcliff v. Call, 72 Texas, 491, 10 S. W., 578.

⁷⁵ Wood v. Hollander, 84 Texas, 394, 19 S. W., 551.

⁷⁶ Franks v. Chapman, 61 Texas, 576.

The district court has no original probate jurisdiction, except upon the disqualification of the judge of the county court, and the record of a probate case in a district court must show affirmatively that such exception exists.⁷⁷

Suits Against County.

"Suits against any county shall be commenced in some court of competent jurisdiction within such county."

Where the county is sued and there are other defendants, this section will control section four, and suit must be brought in the proper court in the defendant county.⁷⁸

Mandamus.

"Suits for *mandamus* against the heads of any of the departments of the State government shall be brought in the district court of the county in which the seat of government may be."

The Legislature in 1881 passed an act as follows: "No court of this State shall have power, authority, or jurisdiction to issue the writ of *mandamus* or injunction or any other mandatory or compulsory writ or process against any of the officers of the executive departments of the government of this State, to order or compel the performance of any act or duty which by the laws of this State they or either of them are authorized to perform, whether such act or duty be judicial, ministerial, or discretionary."⁷⁹

This was carried forward into revision of 1895.⁸⁰ This seems to take from the courts power to entertain suits of the kinds referred to in this section, and consequently to practically annul the section.⁸¹

Suits in Behalf of the State.

"Suits in behalf of the State for the forfeiture of the charters of private corporations chartered by the act of the Legislature shall be

⁷⁷ *Bowser v. Williams*, 6 Texas Civ. App., 197, 25 S. W., 453.

⁷⁸ *Montague Co. v. Meadows*, 31 S. W., 694.

⁷⁹ Acts 1881, p. 7.

⁸⁰ Rev. Stats. 1895, art. 4861.

⁸¹ As to effect of arts. 4861 and 1012 as to jurisdiction of Supreme Court, see *Teat v. McGaughey*, 85 Texas, 479, 22 S. W., 302; *Pickle v. McCall*, 86 Texas, 217, 24 S. W., 265; *McKenzie v. Baker*, 88 Texas, 674, 32 S. W., 1068.

commenced in the district court of the county in which the seat of government may be.”⁸²

Suits on Behalf of the State to Forfeit Lands Fraudulently Alienated.

“Suits on behalf of the State to forfeit land fraudulently or colorably alienated by railway companies in fraud of the rights of the State, under the laws granting lands to railway companies, shall be brought in the county in which the seat of government may be.”⁸³

Suits Against Private Corporations.

“Suits against any private corporation, association or joint stock company may be commenced in any county in which the cause of action or any part thereof arose, or in which such corporation, association, or company has an agency or representative, or in which its principal office is situated. And suits against a railroad corporation, or against any assignee, trustee, or receiver operating its railway may also be brought in any county through or into which the railroad of such corporation extends or is operated. Suits against receivers of persons and corporations may also be brought as provided for in article 1484.

“Art. 1484. Actions may be brought against the receiver of the property of any person where said person resides. Actions may be brought against the receivers of a corporation in the county where the principal office of said corporation may be located, and against the receivers of a railroad company in any county through or into which the road is constructed, and service of summons may be had upon the receiver, or upon the general or division superintendent of the road, or upon any agent of said receiver who resides in the county in which the suit is brought.”

In 1874 the Legislature passed two acts, one on March 21st, the other on April 17th, the effect of which is practically the same as this section. Some objection was made to the constitutionality of this legislation, based on defects in the forms of the acts. These were overruled.⁸⁴ They would, however, have no application to the law in its present form, had they been sustained.⁸⁵

In 1879, the two acts of 1874 were combined and enacted in the

⁸² Rev. Stats. 1895, art. 1194, sec. 21.

⁸³ Const. art XIV, sec. 15; Rev. Stats. 1895, art. 1194, sec. 22.

⁸⁴ Breen v. Railway Co., 44 Texas, 302.

⁸⁵ Railway Co. v. Willie, 53 Texas, 324; Railway Co. v. Ford, 53 Texas, 371.

language now used, except the last sentence regarding suits against receivers in article 1484.

This section fixes venue not by the nature of the suit or of the matters to be affected thereby, but solely by the character of the defendants—private corporations, associations, and joint stock companies. The first and third of these terms is readily understood; what is included in the second is not so apparent. We have found no case construing it, and will not undertake to give its meaning.

Against any defendant embraced in these terms suit may be brought in any one of a number of counties. The first county designated is that in which the cause of action or a part thereof arose. Naturally this provision soon came before the courts for construction. In an early act organizing justices' courts, the venue of actions in those courts was made in many instances to depend upon where the cause of action arose. In construing this expression in the case of *Philio v. Blythe*,⁸⁶ the Supreme Court says: "In what does a cause of action consist? It may be defined to consist as well of the right of the plaintiff in the action as of the injury to such right. In *Chitty on Pleadings*, volume 1, p. 288, the three principal points of a cause of action are said to be (1) the right whether founded upon contract or tort, (2) the injury to such right, and (3) the consequent damages. It may be admitted that the term cause of action is sometimes used in a more limited sense, and that where the cause is founded on a contract, the contract itself is denominated the cause of action; but more frequently, and where the terms are used with more precision and accuracy, the term embraces a much wider scope and includes not only the contract, but its performance, if executory, and also the breach of such contract." This definition was adopted by the Supreme Court when the phrase came up for construction under this statute,⁸⁷ and has since been adhered to.⁸⁸

The next county in which venue may be laid is one in which the corporation or association or company has an agency or representative. Under this the company may be sued in any county where it has an established place of business or a local representative acting for it, without reference to the location of its corporate domicile, or principal office, or where the cause of action arose. The third county is that in which the principal office is located.⁸⁹ If the defendant be a railway company or an assignee, trustee, or receiver of such a company, in

⁸⁶ 12 Texas, 124.

⁸⁷ *Railway Co. v. Hill*, 63 Texas, 383.

⁸⁸ *Railway Co. v. Horne*, 69 Texas, 643, 9 S. W., 440; *E. M. Co. v. Weddington*, 21 S. W., 576.

⁸⁹ *Railway Co. v. Trawick*, 84 Texas, 65, 19 S. W., 370; *Railway Co. v. Worley*, 25 S. W., 478.

addition to the above, suit may be brought against him or it, as the case may be, in any county into or through which the line of road extends. As stated at the beginning of the chapter, there is not perfect accord in the decisions as to the privilege of the defendant when the case comes within different sections of the statute. The Supreme Court holds that this section is cumulative to section number fourteen regarding lands, and that where the cause of action is for damages to lands the suit may be brought under either section,⁹⁰ while the Court of Civil Appeals at Fort Worth holds that in actions of trespass to try title a railway company can insist upon its privilege of being sued only in the county where the land lies.⁹¹

Article 1484 and so much of section 23 above as applies to receivers are innovations on the equity rules of practice which formerly required that all suits against a receiver should be brought in the court in which the receivership was pending, or, if that court had no jurisdiction of the matter, then in such court having jurisdiction as the chancellor might select to try it.

These statutes are legal consent for the institution and maintenance of all suits in courts of competent jurisdiction in the counties designated, not involving the general management of the receivership or the distribution of the funds. The language of our Supreme Court in *Dillingham v. Russell*,⁹² is appropriate here: "No court can interfere with the custody of property held by another court through a receiver, but may establish by its judgment a debt against the receivership, which must be recognized even by the court appointing the receiver, and it is not open to revision by it if the court rendering the judgment had jurisdiction of the subject matter and the parties.

"The manner in which a judgment so rendered shall be paid, and the adjustment of equities between all persons having claims on the property and effects in the hands of a receiver made, must necessarily be under the control of the court having custody through its receiver, but this does not affect the jurisdiction of other courts conclusively to establish by judgment the existence and extent of a claim."

The effect of this article so far as venue is concerned seems to be to fix venue in suits against receivers of the estate or property of any individual in the county in which he resides, and in suits against receivers of corporations generally in the county of the domicile of the corporation, i. e., where it has its principal office, and in suits against the receivers of railroads it seems to add nothing to section 23 above considered. Its concluding clause sets forth the practice as to service in case of receivership of railway companies.

⁹⁰ *Railway Co. v. Horne*, 69 Texas, 646, 9 S. W., 440.

⁹¹ *Railway Co. v. Jenkins*, 29 S. W., 1113.

⁹² 73 Texas, 50, 11 S. W., 139.

Suits by Railroad Operatives for Wages.

"Suits by mechanics, laborers, and operatives, for their wages due by railroad companies, may be instituted and prosecuted in any county in this State where such labor was performed, or in which the cause of action or part thereof accrued, or in the county in which the principal office of such railway company is situated, and in all such suits service of process may be made in the manner now required by law."⁹³

Against Foreign Corporations.

Foreign, public, or private corporations, joint stock companies or associations, not incorporated by the laws of this State, and doing business within this State, may be sued in any court within this State having jurisdiction over the subject matter, in any county where the cause of action or a part thereof accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or when the defendant corporation has no agent or representative in the State, then in the county where the plaintiffs or either of them reside."

The provisions of this section are, as among themselves, cumulative rather than exclusive and suit may be brought in a county having any one of the designated conditions.⁹⁴

This section, however, is limited by the general provisions of section three as to nonresident defendants, and if any of the conditions specified in it exist in any county, suit must be begun there.⁹⁵

For facts under which venue was properly laid under this section, see cases below.⁹⁶

Suits Against Insurance Companies.

"Suits against fire, marine, or inland insurance companies may also be commenced in any county in which any part of the insured property was situated; and suits against life and accident insurance companies or associations may also be commenced in the county in which the persons insured, or any of them, resided at the time of such death or injury."

⁹³ *Railway Co. v. Cockrill*, 72 Texas, 617, 10 S. W., 702.

⁹⁴ *Bradstreet v. Gill*, 72 Texas, 118, 9 S. W., 753.

⁹⁵ *Railway Co. v. Whitely*, 77 Texas, 130, 13 S. W., 853.

⁹⁶ *Shane v. Railway Co.*, 28 S. W., 456; *Railway Co. v. Edloff*, 34 S. W., 410.

Venue Prescribed by Particular Law.

“Whenever in any law authorizing or regulating any particular character of action, the venue is expressly prescribed, the suit shall be commenced in the county to which jurisdiction may be so expressly given.” There is no decision construing this section, but doubtless the same principles will govern here that have been applied to other sections and the requirement is not mandatory.

Quo Warranto.

“Suits against persons illegally claiming or holding any State office or appointment as contradistinguished to a county or district office, shall be brought in the district court of Travis County.”⁹⁷

Removal of Officers.

Proceedings for removal of a county or precinct officer may be brought in the county of the residence of such officer,⁹⁸ and of a district attorney either in the county of his residence or in any county in his district in which the alleged cause of removal occurred.⁹⁹

By the State for Patent Fees.

Suits for patent fees due the State may be brought in the district court of Travis County,¹⁰⁰ and as such fees are a lien on the land, it would seem that the suit might also be brought in the county where the land lies.¹⁰¹

For Penalties Under Railroad Commission Act.

Suit in behalf of the State for penalties for violation of the railroad commission law shall be brought in Travis County.¹⁰² Suits against

⁹⁷ Rev. Stats. 1895, art. 4349.

⁹⁸ Rev. Stats. 1895, art. 3542.

⁹⁹ Rev. Stats. 1895, art. 3554.

¹⁰⁰ Rev. Stats. 1895, art. 4195.

¹⁰¹ Rev. Stats. 1895, art. 4196.

¹⁰² Rev. Stats. 1895, art 4577.

railroad companies by individuals for damage or penalties for violating said law may be brought in any county into or through which the railroad may run.¹⁰³

Suits to Recover Occupation Tax and Forfeiture.

Suits to recover occupation taxes and forfeiture under Act of June 20, 1897, may be brought in the courts of Travis County.¹⁰⁴

To Supply Lost Records.

There is a special statutory action for supplying lost records which must be brought in the county where the record was destroyed.¹⁰⁵

County Boundaries—Water Courses.

In all cases where any part of a river, water course, highway, road, or street shall be the boundary line between two counties, the several courts of each of said counties shall have jurisdiction in all cases over such parts of said river, water course, highway, road, or street as shall be the boundary of such county, in the same manner as if such parts of said river, water course, highway, road or street were within the body of such county.¹⁰⁶

Scire Facias.

It has been held in several cases that *scire facias* to revive a judgment is a continuation of the old suit and not the institution of a new, and must consequently be brought in the county in which the judgment sought to be revived was rendered. This question first arose in *Waller v. Huff*,¹⁰⁷ but as there was a difference of opinion among the members of the court, and as a decision of this point was not necessary to the determination of the case, it was left open. In *Perkins v. Hume*,¹⁰⁸ the question came up in such form as to require a decision,

¹⁰³ Rev. Stats. 1895, art. 4575.

¹⁰⁴ Batts' Stats., art. 5049a.

¹⁰⁵ Rev. Stats. 1895, art. 4595.

¹⁰⁶ Rev. Stats. 1895, art. 1195.

¹⁰⁷ 9 Texas, 530, 1853.

¹⁰⁸ 10 Texas, 50, 1853.

and the doctrine stated in the text was announced. This has several times been reiterated.¹⁰⁹

PRACTICE.

The plaintiff determines in the first instance in what court he will bring the suit. If the court has jurisdiction over the subject matter and the defendant makes no objection to the venue, the court must proceed to try it. If, however, the plaintiff selects a court not in the county of the defendant's residence, and the defendant asserts in proper form his privilege of being sued in his home county, then the court should pass on the matter, and unless the case comes within one of the numerous exceptions, the suit should be abated at the plaintiff's cost. The plaintiff's petition should always show that the venue is properly laid. When it does not, the question may be raised as one of law, by exception. When the plaintiff does show that the case comes within one or more of the exceptions, the defendant's privilege can not be asserted by exception, but he must traverse or especially deny the facts in plaintiff's petition and also go further and anticipate and negative all other exceptions applicable to the case which might exist.¹¹⁰ Such exception and traverse must be embodied in a plea in abatement which should precede the answer to the merits. The issues of law thus raised are decided by the judge. Either party is entitled to a jury on the issue of fact. On principle, the burden of proof is on the defendant to establish the truth of the facts in his plea in abatement, but the decisions on the subject are not entirely harmonious.

In *Blum v. Strong*,¹¹¹ the defendant Blum was sued in a county other than that of his residence, the plaintiff charging him with conspiracy and combination with the other defendant, who did live in the county where suit was brought. The court says: "To these allegations the constable only pleads a general demurrer; and the Blums their privilege of being sued in Galveston County, that being the place of their residence, but they did not plead that the allegations of the petition were fraudulently made with the view of giving the district court of McClellan County jurisdiction of the persons of the Blums.

The jurisdiction of a court must be determined by the allegations of the petition, except when it is averred in the answer that the allegations are fraudulently made for the purpose of conferring jurisdiction and there is issue joined, and it is found that the allegations were in

¹⁰⁹ *Hopkins v. Howard*, 12 Texas, 7; *Masterson v. Cundiff*, 58 Texas, 473; *Schmidke v. Miller*, 71 Texas, 103, 8 S. W., 638.

¹¹⁰ *Railway Co. v. Graves*, 50 Texas, 201; *Stark v. Whitman*, 58 Texas, 376.

¹¹¹ 71 Texas, 322, 6 S. W., 167.

fact fraudulently made for the purpose of giving the court jurisdiction." This case seems to lose sight of the difference between allegations as to the jurisdiction over subject matter, and those regarding the defendant's privilege of being sued in a particular county. No cases, either before or since, have enforced the rule announced.

In the later case of *Hilliard v. Wilson*,¹¹² the Supreme Court adopted a decision by the Commission of Appeals, which takes just the opposite view of the subject and notes the distinction above pointed out between questions of jurisdiction over the subject matter and venue. The case, however, makes no reference to *Blum v. Strong*. The following is from the opinion: "The right to maintain a suit in a county other than that in which the statute fixes the venue must depend upon the existence of the fact or facts which constitute an exception to the statute, and not upon the mere averment of such fact or facts. Where jurisdiction of the person of a defendant is claimed under some exception to the general statute of venue, and he pleads the privilege of being sued in the county of his domicile as provided by the statute, to defeat this plea and deprive him of that right, we think that the facts relied on should not only be alleged but proved."

Graves v. Bank,¹¹³ was a suit in the justice court. The defendant plead in abatement that he was sued in the wrong precinct. This was decided against him and error was assigned on such decision. The court says: "In disposing of this assignment, it will probably be sufficient to say that it does not appear that any evidence was offered to sustain the plea of privilege. The mere averment of facts without proof of them is insufficient to found a judgment upon." This seems to clearly intimate that the burden of proving his plea of privilege is on the defendant.

In *Hobson v. Caswell*,¹¹⁴ the Court of Civil Appeals holds affirmatively that the facts set out in the plea must be proved by the defendant. This is the general rule of practice,¹¹⁵ and seems to be best supported by reason and authority.

There are numerous cases which substantially say that in order that the plaintiff may maintain his suit in a county other than that of the defendant's residence he must bring his case clearly within some statutory exception.¹¹⁶

This only means that in order for plaintiff's petition to be good against an exception interposing the privilege of being sued in the county of the defendant's residence, it must show on its face some fact giving venue

¹¹² *Hilliard v. Wilson*, 76 Texas, 184, 13 S. W., 25.

¹¹³ 77 Texas, 154, 14 S. W., 163.

¹¹⁴ 36 S. W., 312.

¹¹⁵ 1 Am. and Eng. Enc. of Law, 32.

¹¹⁶ *Cohen v. Munson*, 59 Texas, 237; *Lindheim v. Muschamp*, 72 Texas, 33, 12 S. W. 125; *Mahon v. Cotton*, 35 S. W., 869.

in the county in which suit is brought. It does not mean that the court has no jurisdiction and its action will be void unless such facts appear, for such construction would be contrary to principle and also to the unbroken line of cases cited below, holding that failure to set up his privilege by the defendant is a waiver of it. When the plaintiff does set out in his petition facts which bring his case within one of the exceptions, failure to prove such facts on the trial on the merits or proof absolutely disproving them can not be taken advantage of by the defendant, unless he has properly plead in abatement. This is illustrated by the case of *Wilson v. Adams*,¹¹⁷ in which plaintiff declared upon a contract as payable in the county in which suit was brought. No plea in abatement was filed by the defendant. On the trial the plaintiff offered in evidence a contract which was not payable there. The defendant could not object to the venue at that stage of the case, and the court properly retained the case and rendered judgment for the plaintiff.

The cases holding that matters of venue are not jurisdictional but in the nature of personal privileges which may be waived, either expressly or by failure to interpose a defense at the proper time and in the proper manner, are too numerous to consider in detail. A number of them are given below.¹¹⁸

The same principles apply to cases in which the suit is for recovery of real estate and is brought in a county in which no part of the land lies. It has repeatedly been held that the clause of the statute applicable in such cases is neither mandatory nor jurisdictional, and that upon defendant's failure to assert the privilege in due order of pleading the court not only may but must proceed with the trial.¹¹⁹

Where several persons live in several counties and venue is fixed by residence of one of them, the fact that such defendant dies pending the litigation and the case is dismissed as to his estate does not furnish ground for abatement of the suit.¹²⁰

In *York v. State*,¹²¹ there was an agreement in the written contract of lease to the effect that any litigation growing out of the lease contract or its breach might be brought in the district court of Travis County.

¹¹⁷ 15 Texas, 326.

¹¹⁸ *Morris v. Runnels*, 12 Texas, 177; *Masterson v. Ashcom*, 54 Texas, 324; *Masterson v. Cundiff*, 58 Texas, 474; *Sanger Bros. v. Overmeier*, 64 Texas, 58; *De la Vega v. League*, 64 Texas, 214; *State v. Snyder*, 66 Texas, 687, 18 S. W., 106; *Bonner v. Hearne*, 75 Texas, 242, 12 S. W., 38; *Fairbanks v. Blum*, 2 Texas Civ. App., 482, 21 S. W., 1009; *Board of Trade v. Cooke*, 6 Texas Civ. App., 325, 25 S. W., 330; *Kemp v. Bank*, 4 Texas Civ. App., 649, 23 S. W., 916; *Campbell v. Wilson*, 6 Texas, 392; *Poole v. Pickett*, 8 Texas, 124.

¹¹⁹ *Ryan v. Jackson*, 11 Texas, 400; *Morris v. Runnels*, 12 Texas, 177; *De la Vega v. League*, 64 Texas, 214.

¹²⁰ *Lewis v. Davidson*, 51 Texas, 256.

¹²¹ 73 Texas, 651, 11 S. W., 369.

The defendant was a nonresident of the State. Suit was brought in the district court of Travis County and notice given York in Missouri by delivery of citation and copy of petition, under article 1230. It was insisted that this contract was an agreement to enter a voluntary appearance and gave the court jurisdiction over the person without the necessity of complete legal service. In deciding the case, the Supreme Court says: "The proposition that the agreement contained in the lease contract gives the court jurisdiction over the appellant we think can not be sustained. The agreement may have fixed the venue, but it could not operate as acceptance, waiver of service, or appearance." To have given the agreement the effect contended for by the State, would have made it violate the provisions of article 1349 of the Revised Statutes, prohibiting agreements to accept service, enter appearance, or confess judgment in the contract or instrument sued on, or in a contract or instrument made prior to the institution of the suit.

CHANGE OF VENUE.

As has been seen, if the venue of the case is properly laid by the plaintiff, the defendant can not have the suit abated. If the venue is improperly laid, the court will, upon proper application, abate the suit. This can be accomplished only by plea in abatement, preceding answer on the merits. This terminates the suit, but leaves the cause of action undetermined and the plaintiff is free to bring another suit in the proper county. In cases in which the suit is properly brought it is sometimes desirable to transfer the case to another county for trial. This is called changing the venue of the case. This can not be done except by authority of law.¹²²

Our statutes now provide that the venue of a case may be changed, by both parties acting together, without other cause than their desire, or upon the application of either party based upon sufficient cause¹²³ or in the case of the creation of a new county, by the defendant alone, if he resides in the territory embraced in it.¹²⁴ We will consider these in their order.

The statute as to change by consent requires it to be by the written agreement of all parties to the suit or their attorneys of record, filed in the cause. This agreement should indicate the county to which the case is to be sent; and the limitations as to the nearest county which are prescribed in case of change upon the application of one party do not

¹²² *Taylor v. Williams*, 26 Texas, 585; *Wilson v. Catchings*, 41 Texas, 587.

¹²³ Rev. Stats. 1895, art. 1270.

¹²⁴ Rev. Stats. 1895, art. 1274.

apply. The change is made by the court by an order entered on the minutes.¹²⁵ This statute is operative in cases of trespass to try title, notwithstanding the mandatory language of the statute fixing venue in such cases.^{125a}

Change on Application of One Party.

Change by either party is provided for as follows:¹²⁶

"A change of venue may be granted in any civil cause upon application of either party, supported by his own affidavit and the affidavit of at least three credible persons, residents of the county in which the suit is pending, for any of the following causes:

"1. That there exists in the county where the suit is pending so great a prejudice against him that he can not obtain a fair and impartial trial.

"2. That there is a combination against him instigated by influential persons by reason of which he can not expect a fair and impartial trial.

"3. For other good and sufficient cause, to be determined by the the court."^{126a}

This statute has undergone several changes since its original enactment, but none of these are essential to the proper understanding of it in its present form.

Disqualification of the district judge was also formerly a ground for change of venue; but this is no longer the case, as under the present law, parties may agree upon a special judge to try the cause or the Governor may appoint one.

The benefits of the statute quoted above are open to each party alike, whether he be a plaintiff who was compelled by law to institute his suit primarily in the county from which he now wishes to have it transferred, or a defendant to whom the statute does not afford the privilege of abatement of the suit brought against him by plaintiff. The circumstances entitling to change and the procedure to be pursued are the same for both parties.

A written application sworn to by the party desiring to change must be filed, and this must be further supported by the affidavit of at least three credible persons who reside in the county in which the suit is pending. The application must be based on these affidavits, and must state

¹²⁵ Rev. Stats. 1895, art. 1270.

^{125a} *Burnley v. Cook*, 13 Texas, 592; *State v. Snyder*, 66 Texas, 695; *Watson v. Baker*, 67 Texas, 50, 2 S. W., 375.

¹²⁶ Rev. Stats. 1895, art. 1271.

^{126a} Act April 7, 1874, sec. 1; 14 Leg., p. 66; Pasch. Dig., art. 5885a.

either "that there exists in the county where the suit is pending so great a prejudice against the applicant that he can not obtain a fair and impartial trial," or "that there is a combination against him instigated by influential persons, by reason of which he can not expect a fair and impartial trial," or he must give some other good and sufficient reason to be judged of by the court. The truth of this application and supporting affidavits can not be inquired into. The only opposition that can be made by the adverse party is either that the application and supporting affidavits are not sufficient on their face to entitle the applicant to the order, or that the persons making the corroborating affidavits are not credible persons.¹²⁷

One of the interesting questions involved in those cases in which there are more than one party on the side of the docket from which the application comes is whether all must join in the motion or whether one or more of the plaintiffs or defendants, as the case may be, can change the venue without the joinder of all. This was considered by the Court of Civil Appeals at San Antonio, in the case of *Mills v. Paul*,¹²⁸ and this conclusion reached: that as a general rule of practice, all the parties, plaintiffs or defendants, as the case may be, should join in the application; but if, in any particular case, it is made to appear that the parties applying are all the real parties to the litigation on that side of the docket, and that the others are merely formally joined or are joined for the purpose of hampering the applicants in the assertion of their rights, the rule should be relaxed and the motion by all of those really interested should be entertained. It seems that, in this case, one of the defendants, who did not join in the application made by his codefendants, affirmatively objected thereto; and, the case not coming within either of the exceptions, the application was denied. Whether or not the fact that some of the parties remain passive, refusing either to join or to oppose the application, would have the same effect does not appear.¹²⁹

In *Stafford v. Blum*,¹³⁰ the venue was changed upon the application of one of the defendants whose interests were adverse to those of his codefendants as well as to those of the plaintiffs. No objection was raised by any of the parties. The suit was afterward dismissed as to the defendant who had procured the change and objection to the jurisdiction was then made, because there was no party before the court who had been instrumental in making the change. The Court of Civil Appeals held that the cause was properly retained by the trial court, saying that its jurisdiction was not affected by the judgment of dismissal.

¹²⁷ Rev. Stats. 1895, arts. 1271, 1272.

¹²⁸ 30 S. W., 559.

¹²⁹ *Peters v. Bonta*, 22 N. E., 95; *Ziller v. Martin*, 54 N. E., 331.

¹³⁰ 7 Texas Civ. App., 294, 27 S. W., 12.

From these cases, it seems that it is proper for all the parties on one side of the docket to join in the application; that, in ordinary cases, an application made by one and acquiesced in by the others is sufficient; that, if in any case any one of the parties objects to the change this objection will prevent it, unless it be made to appear that he is a mere formal or nominal party or that there is a substantial difference between his rights and those of the persons applying, so that their interests may be said to be in fact adverse.

Time of Making Application.

The Code of Criminal Procedure is quite explicit as to the time of making and acting upon applications for change of venue in criminal cases.

There are no such provisions in the civil statutes, and the courts have been left to decide the matter upon general principles. It has been decided that an order changing the venue before one of the defendants had been served with process or otherwise subjected to the active jurisdiction of the court is erroneous as to such party,¹³¹ and that the judgment against him in the second court will be reversed. From this it would seem to follow that it would be essential to wait until all necessary parties defendant had been served or had appeared. The application should not be postponed to such time as will interfere with the dispatch of business and the orderly conduct of the cause.¹³²

The right to remove a cause upon the statutory grounds is a substantial one which must be recognized and enforced by the courts when properly insisted upon; and it has been held that an application filed more than nine months after the bringing of the suit, but before announcing ready for trial, was in proper time, since it was shown not to have hindered the trial.¹³³

In another case, application was allowed after an ineffectual effort to secure a jury.¹³⁴

The application, like any other matter presented to the court for its action, presents two questions for consideration,—first, the legal sufficiency of the matters stated, if the allegations be true; and second, the truth of the allegations. Two of these matters of law, viz., parties and time, have been considered. When an application is made by the proper parties and at the proper time, still other questions may arise. Is the application in the proper form? Is it properly supported by

¹³¹ *Woodward v. Rodgers*, 20 Texas, 176; *Andrews v. Beck*, 23 Texas, 456.

¹³² *Cook v. Garza*, 9 Texas, 358.

¹³³ *Ellis v. Stearns*, 27 S. W., 222.

¹³⁴ *Salinas v. Stillman*, 25 Texas, 12.

affidavit of a sufficient number of properly qualified persons? Does it set forth a legal ground for the change?

There is no prescribed form for the application, and any instrument filed in the case, having the proper substance and supported by affidavit as required, is sufficient as to form. The supporting affidavits must be made by the requisite number of citizens of the county, must be positive, and must cover the facts relied upon as grounds for the application.

These affidavits may be made before any officer authorized to administer oaths and give a certificate under seal. They must be made so near the time of filing the application that they show the state of affairs then existing. If the application is based on the grounds set out in either the first or second clauses of the statute, the better practice is to follow the statute exactly, though any other language legally equivalent will be sufficient. If it is based upon some other ground thought to be covered by the third clause of the statute, its sufficiency is very largely within the discretion of the court. Under this clause the test is the same as under the other two,—that is, do the circumstances alleged show that the applicant could not have a fair and impartial trial, or do they destroy a reasonable expectation of such trial. The purpose of all litigation is to arrive at the truth of the matters litigated and to impartially apply the rules of law to the truth so ascertained; and any fact or circumstance, local in its nature, which will defeat this purpose in any given case, or which destroys a reasonable expectation of such a result, is sufficient ground to sustain an application to change the venue of the case from the locality so affected.

While it is true as above stated that, in the nature of things, the application presents issues both of law and of fact, the Legislature has, as a matter of public policy, very much limited the authority of the court in the investigation of the facts. Indeed, it has entirely shut off any traverse or contest of the facts set up as ground of the motion, and limits the inquiry to the credibility of the persons making the supporting affidavits.¹³⁵

This attack upon the credibility of the compurgators must be made in the court in which the motion is presented, and not for the first time in the court to which the case has been sent, or in the appellate courts.¹³⁶

When the credibility of the persons making the affidavit is attacked, the issue is tried by the judge and not by jury.

The order changing the venue must name the court to which the cause is to be removed. This court may be selected by agreement of the parties, but in the absence of such agreement the judge will send the case to the county, the courthouse of which is nearest to the courthouse

¹³⁵ Rev. Stats. 1895, art. 1272; *Farley v. Deslonde*, 58 Texas, 589.

¹³⁶ *Farley v. Deslonde*, *supra*; *Harris v. Schuttler*, 24 S. W., 991.

of the county in which the case is pending, unless some legal objection to such county exists and is shown to the court. In the latter case the cause will be sent to the county, not subject to objection, whose courthouse is nearest. The nearest courthouse is not necessarily the one nearest geometrically, but the one most accessible.¹⁸⁷

Venue may be changed on motion of any one or of all of the defendants when, since the institution of the suit, a new county has been organized embracing the residence of such applicant, or applicants, if he or they make sufficient affidavit that at the time the suit was instituted none of the defendants resided in the limits embraced in the old county at the time of making the application, and that none of them reside therein at the time of filing the affidavit, but that at such dates they were and are residents within the territory embraced in the new county. Upon such affidavit having been filed, it is the duty of the court to change the venue to the new county, unless from the record in the case it appears that the venue is properly laid in the old county irrespective of the residence of the defendants.¹⁸⁸

Effect of Change.

When an order changing the venue of a case is properly made, it at once removes the case from the active jurisdiction of the court making the order and places it in the active jurisdiction of the court into which the venue is changed, and the former can no longer make any valid order in it except by the agreement of all parties to be affected.

¹⁸⁷ Rev. Stats. 1895, art. 1273; *Shaw v. Cade*, 54 Texas, 309; *Loonie v. Tillman*, 3 Texas Civ. App., 332, 22 S. W., 524.

¹⁸⁸ Rev. Stats. 1895, art. 1274.

CHAPTER XI.

GENERAL PRINCIPLES OF PLEADING.

To understand and apply the general principles of law with regard to pleading, it is essential to keep in mind the nature and functions of a court—that it is an agency created by the sovereign to represent and act for it in the redress of private and public wrongs. The powers of this agency and the rules governing it in redressing public wrongs do not come within procedure in civil cases and need not be considered. Except in a very few cases, such as the appointment of guardians for the estates of minors and others of a similar nature specially provided for by statute, these agencies of the sovereign do not act of their own motion in civil cases, nor take the initiative in vindicating private rights and redressing private wrongs. If, therefore, any person desires to invoke the exercise of this power in his behalf, he must seek out the proper court and present his complaint to it, and the court thus applied to acts upon such complaint and will consider no facts not presented therein. It is therefore necessary that the party coming before the court shall state in his presentation of the matter every fact which he desires it to take into account in granting him the relief which he seeks. He can not expect it to supply any omissions in such presentation, or hear any facts in addition to those stated by him in his complaint, or even to consider them if, by any means, they should be developed in the trial. This statement of facts to the court by the complainant is pleading by him.

It is one of the fundamental principles of our law that the rights of no person shall be adjudged or determined until he has had fair legal opportunity to be heard, and the court as an agency of the sovereign can not receive as true, and act finally upon, the *ex parte* statement of the complainant, but must give an equal opportunity to the party complained against to come before it and present to it every matter which he desires it to consider in determining the controversy between him and the party bringing the suit. This statement of his side of the case is also pleading. The primary purpose of pleading may therefore be said to be to inform the court as to the matters in controversy between the parties and to invoke the exercise of its authority in settling this controversy.

DEFINITION OF PLEADINGS.

Many definitions of pleadings have been formulated by authors and judges; all of those occurring the works with which we are familiar are

from common law sources, and are largely colored by common law ideas.

Mr. Anderson, in his law dictionary, gives many of these from which we select the following:

"PLEADING. (1) A plea of any nature.

"(2) The statement, in a logical and legal form, of the facts which constitute the cause of action or the ground of defense.

"The formal mode of alleging on the record that which would be the support or the defense of the party on evidence. (*Reed v. Brookman*, 3 F. R., 159 [1789], Buller, J.)

"The pleadings are the mutual alterations between the plaintiff and the defendant. (3 Black. Com., 293.)

"These altercations are set down and delivered into the proper office in writing. Formerly, they were put in by counsel *viva voce*, in court, and minuted down by the chief clerk; whence in law-French the pleadings are called the 'parol.' (3 Black. Com., 293.)

"The pleadings are the written allegations of what is affirmed on the one side, or denied on the other, disclosing to the court and jury the real matters in dispute. (*Desnoyer v. Hereaux*, 1 Minn., 19 [1851].)

"The office of technical pleading is to inform the court and the parties of the facts in issue: the court, that it may declare the law; the parties, that they may know what to meet by their proofs. (*Hill v. Mendenhall*, 21 Wall., 455 [1874], Waite, C. J.)"

Mr. Burrill defines pleading as: "The individual allegations of the respective parties to an action at common law proceeding from them alternately in the order, and under the distinctive names, following: the plaintiff's declaration, the defendant's plea, the plaintiff's replication, the defendant's rejoinder, the plaintiff's surrejoinder, the defendant's rebutter, the plaintiff's surrebutter; after which they have no distinctive names."

Mr. Black defines pleading as: "The peculiar science or system of rules and principles, established in the common law, according to which the pleadings or respective allegations of litigating parties are framed, with a view to preserve technical propriety and to produce the proper issue.

"The process performed by the parties to a suit or action, in alternately presenting written statements of their contention, each responsive to that which preceded, and each serving to narrow the field of the controversy, until there evolves a single point, affirmed on the one side, and denied on the other, called the 'issue.' upon which they then go to trial.

"The act or step on interposing any one of the pleadings in a cause, but particularly one on the part of the defendant; and, in the strictest sense, one which sets up allegations of fact in defense to the action.

"The name 'pleading' is also given to any one of the formal written

statements of accusation or defense presented by the parties alternately in an action at law; the aggregate of such statement filled in any one cause are termed 'the pleadings.'

"The oral advocacy of a client's cause in court, by his barrister or counsel, is sometimes called 'pleading;' but this is a popular, rather than technical, use.

"In Chancery Practice. Consists in making the formal written allegations or statements of the respective parties on the record to maintain the suit, or to defeat it, of which, when contested in matters of fact, they propose to offer proofs, and in matters of law to offer arguments to the court. Story, Eq. Pl., Sec. 4, note."

Mr. Gould, in his work on pleading, says: "Pleadings are the mutual altercations of the parties to a suit, expressed in legal form, and in civil actions reduced to writing. In a more limited sense, however, 'pleadings' comprehend only those allegations, or altercations, which are subsequent to the count or declaration. In England these altercations were anciently oral, having been offered *viva voce* by the respective parties or their counsel in open court; as is still generally done in the pleadings on the part of the defendant, or prisoner, in criminal prosecutions. * * * The mutual altercations which constitute the pleadings in civil actions consist of those formal accusations and denials which are offered on the one side for the purpose of maintaining the suit, and on the other for the purpose of defeating it; and which, generally speaking, are predicated only of matters of fact. For pleading is practically nothing more than affirming or denying in a formal and orderly manner those facts which constitute the ground of the plaintiff's demand and of the defendant's defense. Pleading, therefore, consists in merely alleging matters of fact or in denying what is alleged as such by the adverse party."¹

The Legislature of California gives this definition: "Pleadings are the formal allegations by the parties of their respective claims and defenses for the judgment of the court."²

The definition most in favor in Texas, both with the courts and the Legislature, is that from Buller, J. in *Reed v. Brookman*, 3 F. R., 159. This was adopted by our Supreme Court in the case of *Mims v. Mitchell*,³ and quoted as follows: "Our pleadings are, or are intended to be, what the English pleadings are defined to be: The statement in a legal and logical manner of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense, or the written statement of those facts, intended to be relied on, as the support or defense of the party in evidence." Its substance was incorporated in the Revised Statutes of 1879, and is retained in the revision of 1895.

¹Gould Plead., 1, 2.

²Code Civ. Proc. Cal., sec. 420.

³1 Texas, 443, 1846.

It is an admirable definition of those pleadings which present issues, and embodies, and tersely expresses, a great deal of the law with reference to them. It does not, however, include pleadings by which issues either of law or fact are joined, and is, in this respect, incomplete as a definition and incorrect as a description under our system.

Suggested Definition.

It is much easier to criticise a definition given by another than to originate one better, still I suggest the following as a possible improvement:

Pleading as a process is the means by which the issues to be determined in any case are tendered and joined between the parties, and made known to the court for adjudication.

Pleadings are the formal statements by the respective parties to a suit of the matters upon which they severally rely as constituting the cause of action or ground of defense in the case, made to the court in conformity with the rules of law.

A pleading is a statement to the court by either party to a suit containing so much of the matters relied upon by him, as his cause of action or ground of defense, as is proper, under the rules of law, to be presented at the stage of the proceedings when the statement is made.

In the courts of Texas in which the pleadings are in writing, all such matters as are required to be plead at any one stage in the progress of the case should be included in one instrument and appropriately designated.

For the designation and a discussion of the different instruments required under our system and what is appropriate to be contained in each of the time of its presentation, etc., see Chapter XII, post.

PLEADING AS A PROCESS.

The plaintiff institutes the suit and presents the first pleading. His purpose in so doing, as above stated, is to advise the court and the defendant of the right claimed by him, and the supposed violations thereof by the defendant, and of injuries resulting or apprehended therefrom, and to request of the court the exercise of its power in redressing or preventing these wrongs. This redress or prevention necessarily consists in compelling the defendant to do or forbear from doing; so that in every suit the plaintiff seeks to induce the court to compel the defendant either to do something for his (plaintiff's) benefit, such as paying him damages for injuries sustained, or delivering into his possession something to which he is entitled and which is wrongfully withheld; or to

abstain from doing some act in violation of some legal right existing in the plaintiff. If the defendant, after being duly cited, admits the plaintiff's rights, and does not desire to contest them, he does not come before the court, and the matter proceeds without him in conformity with the rules provided in such cases. But if he does not admit the plaintiff's case, and desires to prevent the court from exercising the control over him requested by the plaintiff, it is incumbent upon him, if he has been duly served with process, to advise the court of this fact. This he does by filing his first pleading, in which he must set out clearly the reasons, either in law or in fact, or both, why he should not be so controlled. These reasons may, and in most cases do, include matters of denial both of law and fact, and new matter pertinent to the case which in his (defendant's) judgment should defeat the plaintiff's suit. His denial of the propositions of law involved in the plaintiff's suit are presented by demurrers; his denial of the facts alleged by the plaintiff are presented by negative statements known as denials, general or special, and the new matter consists of facts pertinent to the case not alleged by the plaintiff, but which the defendant desires the court to consider. If the defendant's answer is confined to negative averments of law or fact, or both, the pleadings would close here. If, however, it contains new matter, the plaintiff is privileged to reply to this by denial of the propositions of law or fact, or both, involved therein, or by setting up new matter responsive thereto. If this pleading contains only negative averments the pleadings close here; if there is new matter contained in it, the defendant in turn may reply to it either by denial of the law or fact, or both, and by new matter. If this pleading contains only negative matter, the pleadings close; if new matter, the plaintiff is privileged to reply to it. This process is continued until under the rules of the particular system under which the pleadings are prepared the parties join issue or issues.

Issues.

An issue is a matter, affirmed by one party and denied by the other, submitted to the court for determination. These issues are either of law or of fact. Every pleading by either plaintiff or defendant which introduces new facts into the case, no matter at what stage filed, is a presentation of issues, both of law and of fact; filing such plea being an affirmation by the pleader, first, that the law is such, that if the facts stated be true they should have the effect desired by the pleader; and second, that the facts as so presented are true. Issues of law are joined by demurrers, either general or special, which in effect say, "Admitting the facts to be true, they are not a sufficient legal basis for the relief sought, or are not so presented as to permit the court to consider them." Issues

of fact are joined by denials, general or special, which in effect say, "Admitting the law to be as you contend, the facts alleged by you are not true."

Combination of Issues.

Great differences exist in different systems as to the number of issues that may be tendered in a case, the manner of presenting them, the number which may be joined in by the adverse party, and the manner of doing this.

In early common law courts strict rules obtained, both as to the joinder of causes of action and tendering of issues by the plaintiff; and the defendant also was compelled to elect whether he would join issue on the law or the facts, and if he chose the latter, must again select from among the issues tendered some one upon which to submit the case. Under that system the admission of facts by demurrer was not tentative, but conclusive, and if the pleader were mistaken as to the law, and the court decided the demurrer against him, this was an end of the case. He could not then say, "The facts are not true; therefore, the plaintiff is not entitled to the relief." In like manner if he elected to join issue on the facts, this was a practical admission that the law was as contended by his adversary, and the facts being found against him, he could not be heard as to the law, except in a few extreme cases where the error was fundamental; also the selection of the one issue of fact upon which the case was to be tried was a conclusive abandonment of all other issues of fact involved in the case, and the party in whose favor the single issue so selected was decided obtained judgment without reference to other facts.

Courts of equity are less strict, and a party, by observing the rules of practice obtaining therein, as to the time and manner of so doing, can get the advantage of demurrers raising issues of law, and answers and pleas raising issues of fact.

Combination of Issues in Texas System.

Neither of the systems above outlined was ever in force in Texas. Prior to the Mexican Revolution, and for a number of years immediately thereafter, the Spanish civil law obtained. This was somewhat modified by the Congress of Coahuila and Texas, by Decree No. 277, passed April 13, 1834. The Supreme Court of the Republic, in speaking of the procedure under the law of the Republic, in the case of *Jones v. Nowland*,⁴ says: "According to the civil law each party had the privilege of two distinct allegations in order to the presenta-

⁴ Dallam, 452.

tion of questions of law and fact arising: the petition and the answer and the allegations corresponding to the replication and rejoinder in the introduction of the new matter of excuse, of avoidance, and the like. In practice it is necessary to present matters *a limine litis*, and have them determined prior to the introduction of the merits upon the facts." In the civil law and its various modifications, much more liberal rules obtained as to the presentation of the whole controversy to the court. This was continued after the Texas independence. The plaintiff is permitted much latitude in combining different causes of action in the same suit, and equal liberality is extended with reference to the presentation of his facts in different forms and combinations, so as to enable him full opportunity to get before the court the real merits of his case. The same principle is applied with reference to the defendant. The admission of the facts by demurrer is tentative only or for the sake of argument. If the court overrules the demurrer, the defendant has a legal right to controvert the facts and the plaintiff is not entitled to judgment until he has established the truth of his case. Again, the defendant may present as many issues of fact as he may desire—either negative, by way of traverse of the allegations of the plaintiff, or affirmative by suggesting new matter. In short, the object of pleading in Texas is to arrive at the real truth of the matters in controversy and enable the court to ascertain and enforce the substantive rights of the parties, and to avoid, as far as possible, a decision of cases upon technical points and immaterial issues.⁵

STATUTORY PROVISIONS AND RULES.

The Texas statutory provisions on the subject of pleading have always been few and meager, and the development of the system has been largely the work of the courts, principally the Supreme Court, by the decision of cases and the promulgation of rules. The power to make these rules is inherent in the court and is expressly recognized by the Constitution in these words: "The Supreme Court shall have the power to make and establish rules of procedure, not inconsistent with the laws of the State, for the government of said court, and the other courts of this State, to expedite the dispatch of business therein."⁶

The decisions on this subject extend from the first session of the court after its organization up to the adjournment of its last term. The rules on this subject now in force were promulgated and announced

⁵ *Fowler v. Stoneum*, 11 Texas, 479; *Ware v. Bennett*, 18 Texas, 807; *Wallis v. Walker*, 73 Texas, 11, 11 S. W., 123; *City of Sherman v. Connor*, 88 Texas, 41, 29 S. W., 1053.

⁶ Const., art. V, sec. 25.

by the Supreme Court on the first day of December, 1877, Judge Roberts then being Chief Justice, and Judges Moore and Gould Associate Justices. These rules have been revised from time to time in various details, but have never been changed in purpose or policy. In their original form they are contained in the appendix of volume 47, Texas Reports. In their present form they appear in appendices to volumes 84 and 87 of the Texas Reports.

The statutes and rules now in force, so far as they pertain to pleading generally, are as follows:

"Art. 1181. The pleadings in all civil suits in the district and county courts shall be by petition and answer.

"Art. 1182. The pleadings in said courts shall be in writing and signed by the party, or by his attorney, and filed with the clerk of the court."

"Art. 1183. The pleading shall consist of a statement, in logical and legal form, of the facts constituting the plaintiff's cause of action, or the defendant's grounds of defense."

These articles were adopted in the exact form in which they now exist in 1879; prior to that time there had been statutory provisions practically equivalent to these, but the language was different.⁷

"DISTRICT AND COUNTY COURT RULES.

"1. The pleadings in the district and county courts shall, as prescribed by statute, be by petition and answer."

"2. The pleadings, with the exception of those presenting issues of law, must be a statement of facts, in contradistinction to a statement of evidence, of legal conclusions, and of arguments. Facts are adequately represented by terms and modes of expression wrought out by long judicial experience, perpetuated in books of forms, in law and equity, which, though not authoritatively requisite, may generally be adopted as safe guides in pleading. In case of a violation of this rule, to such an extent as to produce confusion, uncertainty and unnecessary length in pleading, the court may require the matter set up to be repleaded, so as to exclude the superfluous parts of it from the record."

"9. The original petition, first supplemental petition, second supplemental petition, and every other, shall be contained in one instrument of writing, and so with the original answer, and each of the supplemental answers.

"10. Each supplemental petition or answer, made by either party, shall be a response to the last preceding pleading by the other party, and shall not repeat the facts formerly pleaded further than is necessary

⁷ See *Winfred v. Gates*, Dallam, 364; *Laws of the Fourth Congress*, p. 88; *Hartley's Dig.*, arts. 639, 669, 671, 688; *Oldham & White's Dig.*, arts. 406, 424-5-6; *Pasch. Dig.*, arts. 297, 1424-25, 1427; *Rev. Stats. 1879*, arts. 1181-2, 1185-6-7.

as an introduction to that which is stated in the pleading then being drawn up. These instruments, to wit, the original petition and its several supplements, and the original answer and its several supplements, shall, respectively, constitute separate and distinct parts of the pleadings of each party; and the position of identity, by number and name, with the indorsement of each instrument, shall be preserved throughout the pleadings of either party.

"11. Each party who files a supplement of any number (as first, second, third, and so on), shall give notice thereof by asking leave of the court, and filing the same amongst the papers of the cause, with the appropriate indorsement thereon, indicating its number and name."

THE TERMS PETITION AND ANSWER GENERIC.

Early in the history of the State the Supreme Court decided⁸ that the terms "petition and answer" as used by Congress in the Act of 1840, and in the subsequent acts by the Legislature, were generic, indicating a system of pleading, rather than the particular written instruments filed by either party, and that this system was adopted in contradistinction and in opposition to the common law. This doctrine has been continuously recognized and enforced by the courts and Legislature. In this generic sense the term "petition" embraces all the pleadings filed by the plaintiff in the progress of the case, including the original petition and the various supplemental petitions and amendments to either; and the term "answer" in like manner embraces all the pleadings by the defendant, including the original answer and the various supplemental answers and amendments to either.

THE SEVERAL INSTRUMENTS OF PLEADING AND THEIR ORDER.

The plaintiff begins the suit by preparing and filing with the clerk of the court his "original petition." This, of course, consists of matters not then before the court. It must state his cause of action, that is, every fact essential to make out a *prima facie* case in his favor; and also the relief sought by him. The first pleading by the defendant is called the "original answer." It consists in a statement of all matters relied on by him in defense, plead at one time and in due order. If all his defenses are negative in their nature, the effect of his answer will be simply to join issue with the plaintiff and the pleadings close here. If, however, in addition to his denials of law and fact he desires to

⁸ Underwood v. Parrott, 2 Texas, 168.

suggest to the court new facts to be considered in connection with those suggested by the plaintiff, he is privileged to do so. They should be included in the same instrument as his negative defenses, all under the one designation "defendant's original answer." Upon the filing of such an answer, the plaintiff has the privilege of replying to it, by denials of law and fact, and by suggesting new matter. This he does by a new pleading called "plaintiff's first supplemental petition." If this is simply negative in its nature, the pleadings must close here. If, however, it sets up new matter, the defendant may reply to it, either by denials of law and fact, or suggesting new matter, or both. This he does by a new pleading on his part styled "defendant's first supplemental answer;" and this process may continue indefinitely as long as either party sets up new matter pertinent to the last preceding pleading of his adversary, each succeeding instrument taking its designation as plaintiff's second, or third, or fourth supplemental petition, defendant's second, or third, or fourth supplemental answer, as the case may be. It is not obligatory on either party after the filing of the original answer by defendant to reply to his adversary's pleading. If it contain only negative defenses, these are only joinders in the issues already tendered, and can not be replied to. It would be senseless to demur to a demurrer, or to deny a denial. If it contains new matter, it is still not obligatory to reply, as the statute provides that such new matter shall be regarded as denied unless it is admitted.⁹

RULES OF CONSTRUCTION.

Before discussing the requirements as to the manner of preparing these pleadings of different kinds, it may be well to consider briefly the rules of construction which are applied to pleadings generally, and also the effect of defects of certain kinds. It is apparent that there are a great many different ways of stating the same matter, and that some of these are much better than others, and therefore there will be great differences in the form and merits of different instruments filed in different cases, intended to be considered as pleadings.

It may be stated as a universal rule that however defective a pleading may be in form, if it contain every material fact which the court and the adverse party should be informed of, it will be *prima facie* good, and the court of its own motion will not disregard it, nor can the other party to the suit have it stricken out or disregarded upon a general suggestion of error, but if he desires the information in more exact and artistic form, he must point out to the court and adverse party the formal defects in the paper filed and thus have it corrected. Recogniz-

⁹ Rev. Stats. 1895, art. 1193.

ing this distinction between substance and form, the rules of pleading require different methods of presenting objections to them respectively. Issues as to the substance of the petition may be raised by general demurrer, which suggests to the court that the facts contained in the pleading demurrer to, if true, do not have the legal effect claimed by the pleader and do not entitle him to the action asked thereon. On the issue thus tendered, the only inquiry is, does the pleading demurred to, construed reasonably, contain all the facts necessary to support the pleader's case, and if this is answered in the affirmative, the demurrer will be overruled, however unsatisfactory the form of the pleading may be. Issues of form, however, may be raised by special demurrers, which point out the formal defects complained of, and when so raised must be considered by the court. Unless the demurrer does point out these defects it is in effect only a general demurrer whatever the pleader may style it.

The rules of construction which apply to the petition are different under these different forms of objection. In considering a general demurrer, every reasonable intendment and meaning favorable to the pleader preparing the instrument will be indulged and if the words used are capable of any reasonable interpretation sustaining the instrument, this will be adopted. On the other hand, in considering a special demurrer, the pleading will be construed most strongly against the pleader preparing it. It results that if a pleading is capable of two constructions, one good and the other bad, if it is attacked by general demurrer, the construction sustaining it will be given, and it will be held good; if by special demurrer pointing out the defect, the construction defeating it will be given, and it will be held bad.

From these general observations it is apparent that under our system only those rules which relate to the substance of pleadings are imperative, and that those which relate to form only will be disregarded, unless called to the attention of the court in proper time and manner, and that even then an error of the court in overruling a special demurrer would not be fundamental error, if the substance of the pleading demurred to were good.

PLEADINGS PRESENTING ISSUES.

Coming now to the rules governing the preparation of pleadings, we find by far the most important relate to those instruments which present issues to the adverse party by setting out facts not already in the record. These we will now consider.

The statute quoted above requires that all pleadings presenting issues "shall consist of the statement, in logical and legal form, of

the facts constituting the plaintiff's cause of action or the defendant's ground of defense," and the rules require that "pleadings, with the exception of those presenting issues of law, must be a statement of facts in contradistinction to a statement of evidence, of legal conclusions, and of arguments. Facts are adequately represented by terms and modes of expression wrought out by long judicial experience, perpetuated in books of forms in law and equity, which although not authoritatively requisite may be generally adopted as safe guides in pleading."

The general rules on this subject may be summarized as follows:

1. The pleadings must state facts and should not state law, nor conclusions of law, nor evidence.
2. The facts must be fully set forth, omitting nothing material to the cause of action or defense being plead.
3. All the facts in each count must be consistent with each other though they need not be single.
4. The several counts need not be consistent with each other.
5. In stating facts, the averments should be concise, direct, certain and logically arranged. A pleading should never be verbose, prolix, ambiguous, nor leave material facts to be inferred.

Those rules in which the term "must" is used are imperative, and a violation of any one of them except No. 3 will be fatal on general demurrer. The others are directory, and will not be enforced unless the violation is called to the attention of the court by special demurrers.

6. The facts alleged must truly represent the case and conform to the evidence to be introduced.

WHAT ARE FACTS.

Mr. Webster defines fact as: An effect produced or achieved; anything done or has come to pass; an event; a circumstance. I would add, for greater clearness,—a condition existing or that has existed. This includes *everything that is*, whether material or spiritual, concrete or abstract. If it can be affirmed of any thing or condition that it is, or has been, such thing is a fact. This, of course, embraces all laws and legal conclusions and can not, without qualification be accepted as a correct definition of the term in the use and connection now under consideration.

In common parlance fact and truth are closely connected, and a statement of a fact is usually understood to be a statement which is true. This is the result of a very natural mental process, for as a fact primarily is a thing actually existing, something which has really taken place, or is now actually transpiring, it is very easy to understand how the idea of actual existence or truth should come to be

looked upon as essential to, and included in, all statements regarding facts. In pleading, the use of the term "statement of facts" has been extended from this primary meaning of statements truly importing actual existence of the thing spoken of, to include all statements regarding such actual existence, whether true or false, especially such as affirm the real existence of any thing or condition.

Probably the process was about this: A fact was a real existence, and every statement which truly affirmed the real existence of anything was a statement of fact. Some party would make a statement which represented his honest, though mistaken, belief as to a real existence or fact, and this would, from his point of view, be a fact. This was not strictly a proper use of the word; still, as there was no one to determine definitely whether the statement were true or false, it could not be settled whether it was in strictness a statement of a fact or not. So, the use of the phrase, "a statement of facts," was extended until now it embraces all statements regarding facts, whether such statements be really true or false, and may be said to be a statement of matters claimed as facts, or as real things, acts, or conditions.

Legal Use.

The word "fact" seems to have several distinct meanings in law which must be carefully kept apart.

In the law of evidence it is said that a witness must testify only to facts and not to conclusions or inferences. Here the word means matters actually within the personal knowledge of the witness, or claimed by him so to be. The statement to which he swears may not be true, but if he claims to have direct information regarding it, received directly from his senses and not reached as the result of reasoning or deduction, the statement is admissible. If, however, he undertake to state a deduction or inference drawn by him from other matters, he is not permitted to do so, however correct and true the conclusions might be. Here the distinction is between those things which the witness claims actually took place within his own experience or observation, and as to which he depends upon his memory for information, on the one hand, which are admissible as facts, and those things the existence of which he did not experience or observe, and does not remember, but which he concludes or infers did exist because of certain other matters which he takes as the basis of his reasoning, on the other, which are excluded as conclusions. The statement made by the witness as to his past experience or observation may be false, either wilfully or inadvertently, yet it is considered a statement of a fact and admitted to be judged of by the court or jury. His conclusion might be per-

fectly correct and true, yet it is regarded as a statement of opinion and excluded, because the law has not entrusted the witness with the right to make inferences as to truth of facts, but has left that to the jury.

In pleading fact has a different significance. When it is said that the pleader must state facts, it is never intended to limit his statements to matters within his own knowledge; indeed, the opposite is his duty—to get all the information he can as to the case, to group and combine the various items according to their actual and legal relations and draw therefrom correct deductions, and thus ascertain what the issuable facts in the case really are, and to state these issuable facts in his pleadings. Using malice as an illustration, no witness is permitted to state on the stand that a killing was malicious. This involves an inference from the facts as to the real nature of the matter under investigation which the jury alone may draw, but he must state all the facts within his knowledge, and let the jury draw the conclusion of malice or not as it sees fit. A different rule applies to the pleader. He considers the detailed evidence, concludes that it shows malice, and so charges in the indictment that the killing was done with malice aforethought. The law places the responsibility of drawing this conclusion on the pleader. The purpose is to bring before the court the matters in controversy as contended for by each party. Whether the party committing the homicide was really actuated by malice is, of course, a mixed question of law and fact all the while, and the same question is presented to both the pleader and the witness, but as the one is charged with the duty of deciding and presenting the facts upon which his client relies, he is permitted to state the existence of malice as one of these facts so contended for, and to prove it by any legitimate testimony he may procure, and as the other has nothing to do with deciding the facts, or deciding what shall and what shall not come before the court for investigation, but is only to aid the court and jury in deciding the real truth of the controversy as presented by the parties, he can state only matters within his knowledge, and is forbidden to state any inferences or deductions he may make. In other words, it is the province of the pleader to state all the matters of fact properly involved in his side of the case, whether within his own knowledge or not, as a basis for an intelligent inquiry and investigation by the court into the true state of affairs. It is the province of the witness to aid the court in this investigation by stating those matters only which are within his own personal knowledge.

The term “fact,” as used regarding evidence, never includes conclusions or deductions; in the exceptional cases in which these are received from witnesses they are denominated opinion evidence.

In pleading, no statement which sets out or discloses directly and

positively the existence or non-existence of any thing or condition, the existence or non-existence of which may be established by proof, without involving the determination of any question of law, can properly be classed as a conclusion. The fact averred may be a very comprehensive one, entirely inadequate to give to the court and adverse party, the clear and accurate information to which they are entitled, and the pleading may be, and in many cases, bad for uncertainty, but the averment would still be a statement of fact.

Fact—Definition in Law of Pleading.

What then is a fact within the rules of pleading under consideration. In the present state of the authorities, this is a most difficult question to answer, though as an original proposition it would not seem necessarily to be so.

I suggest the following as approximating a satisfactory solution:

Whenever the standards to which resort must be had to determine whether a thing has been done, or has come to pass, or is now taking place, or that a certain condition once existed or now exists, are not legal but exist *in pais*, the statement that such thing has been done, or has come to pass, or is now transpiring, or that such condition did exist or now exists is, on principle, an averment of fact. On the other hand, whenever the standards which must be used to determine the matter do not exist *in pais* but are legal, then whether such thing has been done, or has come to pass, or such condition has existed or does exist is a mixed question of law and fact. Under this conception, a fact would be any act, event, circumstance or condition capable of proof by evidence, direct or circumstantial, without the necessity of applying any rule of law as a standard by which to determine the question of its existence or nonexistence, and a mixed question of law and fact—frequently called a conclusion of law—would exist whenever, in addition to the proof required to establish the physical facts, some legal rule or standard must be applied, in order to determine the existence or nonexistence of such act or condition.

The idea intended to be conveyed may be made plainer by a few illustrations. The statement that A killed B is a statement of fact, pure and simple. The killing of one person by another is a physical fact, its existence or nonexistence is determinable by testimony and standards involving no legal rules. The statement that A murdered B, however, is a mixed question of law and fact, for all homicide is not murder, and whether or not a particular killing is murder depends upon the facts, judged by legal standards, and these standards and their application are embraced in the statement that any particular killing was murder. Again, a statement that A took B's

purse is one of fact, but that A stole B's purse is a mixed question of law and fact, involving, first, the existence of certain facts, and second, the application of legal rules to the facts, and a conclusion of law drawn therefrom. Again, that A made a false statement of a material matter to B upon a matter peculiarly within A's knowledge, as to which B was ignorant, and upon which statement A designed that B should act, and upon which B did in fact rely and act, to his injury, are statements of fact, susceptible of proof, and to which the court would apply the legal rules and standards of judgment. But that A defrauded B is a mixed matter of law and fact, because it embraces necessarily a determination of what in law constitutes fraud.

I have found no Texas case even attempting a definition. An early case in the Supreme Court of New York¹⁰ has this syllabus:

"In an action under the Code, to recover the possession of real estate, the facts set forth in the complaint must show that the plaintiff has a legal title to the premises in question; the mere averment that he has such a title is insufficient.

"Facts constituting a cause of action, or a defense, in the sense of the Code, are physical facts, capable of being established by oral or documentary proof, not propositions, which are true in law."

And in the opinion uses this language:

* * * "I incline strongly to the belief that the errors, which too frequently occur in pleadings under the Code, must be ascribed to a mistaken interpretation of the words 'facts constituting the cause of action,' or 'a defense;' nor is the source of the mistake difficult to be explained. In writing, and in conversation, the term 'fact' is frequently, and perhaps not improperly, applied to an abstract proposition, a proposition true in morals or in law, but of which the truth depends, not upon testimony, but upon authority or reasoning, and in this sense of the term it is obvious that every abstract conclusion of law is a fact. That such a conclusion, however, although just in itself is not a fact within the meaning of the Code, is evident upon slight reflection, and a single example will be sufficient to prove.

"There is no apparent impropriety in saying, 'it is a fact that Peter owes John a sum of money,' but who will assert that a complaint would be good that should aver that the defendant owes the plaintiff a certain sum of money for which the plaintiff demands judgment, without alleging a single fact from which the debt could arise? Yet, if the words of the Code, 'Facts constituting a cause of action,' refer to conclusions of law, and not to the facts from which, if admitted or proved, the conclusions are to be drawn, then such a complaint would

¹⁰Lawrence v. Wright, — Duer, —

be free from objection. It is really no worse than that now before me, nor than many that almost daily pass under our observation.

"All these errors in pleading will be avoided if it is constantly remembered that the facts which the Code requires to be set forth are not true propositions, but physical facts, capable as such, of being established by evidence, oral or documentary, and from which, when so established, the right to maintain the action, or the validity of a defense, is a necessary conclusion of law—and a conclusion which the court will draw, and which it is quite unnecessary that the pleader should state."

This comes nearer an intelligent statement of the matter than any case that I have found, and I think a careful study and thorough understanding of it will aid very much the Texas student and lawyer, although the particular point decided is not the law here.

The definition given above, and the rule as thus interpreted are not in harmony with a number of decisions, but they seem to be correct in principle, and if so, should be applied in all instances in which the precedents are not too strong against them. There are numerous phrases and terms which, tested by the above rule are mixed matters of law and fact, but the use of which in pleading, as statements of issuable facts, is well established by custom and sanctioned by the courts, and hence is permissible. Many of them are convenient, and there would be no practical advantage in enforcing the rule against them. The following are examples:

"Probable Cause" in a suit for malicious prosecution. That "probable cause" is a mixed matter of law and fact has been expressly decided in numerous cases. In *Landa v. Obert*,¹¹ the court says:

"What facts and circumstances amount to probable cause is a pure question of law. Whether they exist or not in any particular case, is a pure question of fact. The former is exclusively for the court, the latter for the jury. When the facts are in controversy, the question of probable cause must necessarily go to the jury, and then the court must give such instructions as will enable them to draw the correct conclusion from the facts as they find them and the law thus given," citing several authorities.

In *Shannon v. Jones*,¹² a suit for damage for malicious prosecution, the Supreme Court, through the Commission of Appeals, says: "That the question of malice is one of fact and existence or nonexistence of probable cause one of law and fact are rules as old as the action out of which they grew."

Still it is held that in pleading an allegation of want of probable cause is a statement on issuable fact, and the circumstances need not be

¹¹ 45 Texas, 542, 1876.

¹² 76 Texas, 147, 13 S. W., 477.

given. This is announced in *Griffin v. Chubb*,¹³ and reiterated in *Sutor v. Wood*,¹⁴ in these words: "The want of probable cause and malice were issuable facts and not mere conclusions of law, and plaintiff was not required to go beyond the averments of these facts and to allege the evidence by which he expected to establish them."

It is true that in each of these cases the points presented rose upon introduction of testimony and not upon questions of pleading. This may make a distinction, as the Court of Civil Appeals has held to be the case in regard to fraud.¹⁵

It is also settled that it is not necessary in a suit for personal property to aver the facts constituting title. The general allegation that the plaintiff is the owner of the property and is entitled to the possession as against the defendant, or is entitled to damages for its injury or conversion, is all that is necessary.¹⁶

The same rule applies in actions of trespass to try title to real estate.¹⁷

The same is true of malice, good faith, conversion, seizen and possession, and numerous other mixed matters of law and fact. A different rule applies as to fraud,¹⁸ to charges of excesses and cruelty in divorce cases,¹⁹ to unjust discrimination against railroad companies,²⁰ to "good defense" in injunction cases,²¹ and in many other instances which will more fully appear from the extracts from Texas cases given in subsequent portions of this chapter.

When we consider the other side of this question, that the allegation in the pleadings must be of fact and not of evidence, we find difficulties of another kind awaiting us.

Our language is such that some words include only one idea and others are more comprehensive in their significance. In introducing proof the general rule is that it is desirable to use as simple terms embracing as few ideas as possible. But the rule in pleading is the reverse, and terms should be selected which are as comprehensive as con-

¹³ 7 Texas, 603.

¹⁴ 76 Texas, 403, 13 S. W., 321.

¹⁵ *Avery v. Mansur & Tebbetts Imp. Co.*, 37 S. W., 467.

¹⁶ *Raines v. Herring*, 68 Texas, 472, 5 S. W., 369; *Tillman v. Fletcher*, 78 Texas, 675, 15 S. W., 161.

¹⁷ *Rev. Stats.*, art. 4786; *Snyder v. Nunn*, 66 Texas, 257, 18 S. W., 340; *Day Co. v. State*, 68 Texas, 535, 4 S. W., 865; *Tevis v. Armstrong*, 71 Texas, 62, 9 S. W., 134; *Rains v. Wheeler*, 76 Texas, 393, 13 S. W., 324.

¹⁸ *Hendrix v. Nunn*, 46 Texas, 148, 1876; *Brown v. Mitchell*, 75 Texas, 9, 12 S. W., 606, 1889.

¹⁹ *Wright v. Wright*, 3 Texas, 168, 1848.

²⁰ *Railway Co. v. Gallaher*, 79 Texas, 687, 15 S. W., 694.

²¹ *Sharp v. Schmidt*, 62 Texas, 265, 1884.

sistency, certainty and directness will admit. To illustrate, it is universally held a good allegation of the execution of a written instrument to aver that the party charged with liability upon it "executed and delivered" it; while to prove the execution of such an instrument where it is properly in issue, requires evidence of the physical fact of signing and passing over the paper under circumstances showing an intent to be bound by it, and to part with dominion over it. Again, if it is desired to avoid a contract on the ground of mental incapacity of the alleged obligor at the date of its execution, it would be sufficient to plead in general terms that at said time he was of unsound mind, incapable of appreciating the legal consequences and results of his action; while to prove this condition might require most minute examination into, and evidence regarding, his conduct and words for a long period of time. Illustrations might be multiplied indefinitely, but as it is much easier to deal with individual cases, real or hypothetical, than it is to announce a rule of general application, it would not be profitable.

We may, however, say that the main consideration is to convey to the court and the adverse party, clearly and certainly, distinct information regarding the matter being plead; and the most comprehensive terms and phrases, expressive either of facts only or, in instances in which there is good precedent for such use, of mixed law and fact, which will aptly and accurately accomplish this purpose, should be chosen. Detail is to be avoided, and should never be indulged in except in rare cases in which there is no other manner of properly expressing the facts.

To illustrate: A desires to sue B for damages for breaking his arm in an assault and battery committed upon him. To allege that A committed a battery upon B, damaging him in the sum of one thousand dollars, would not be good, for the words committed a battery involve a matter of mixed law and fact, and there is no established precedent for its use. An allegation that A wrongfully and violently struck B with a stick, breaking his arm, and causing him great pain, physical and mental, and the loss of six months time from his work, and stating his wage earning capacity during the time, would be good for these items of actual damage. If the battery had been committed with express malice and B desires to recover exemplary damages, it would be necessary to add to the statement just given the word "maliciously," or some equivalent as descriptive of A's conduct in the premises, and appropriate averments as to the amount of the exemplary damage and prayer for such damages. The word "maliciously" as used above, has a technical and legal meaning, but the precedents justify its use. It would not be good form, however, to go into all the matters of detail, averring the cause of the quarrel between the parties, the length of time it has existed, laying in wait, by A for B, particular descrip-

tion of the stick, etc. These are details which would not only be admissible but indispensable in the proof, but they have no proper place in the pleadings.²²

FULNESS.

The pleadings must consist of facts, and it is indispensable that they contain every fact essential to the maintenance of the pleader's cause. No fact which the pleader desires the court to consider can properly and safely be omitted.

One rule for testing the fulness required is, that the pleading shall be so full that if all its averments be admitted the pleader would be entitled to the action asked of the court.²³

The following cases show the necessity of stating the facts—as distinguished from conclusions of law—and the needlessness of stating conclusions of law when the facts are given, and the insufficiency of legal conclusions when the facts are not set out.

Hamilton v. Battle:²⁴ “Although the technicalities and circumlocution of special pleadings, as practiced under the common law, have been discarded in this Republic by statutory provisions, yet it is not to be understood that recoveries can be had in our courts except in accordance with the state of the pleadings; nor is the plaintiff absolved from the necessity of setting out in his petition fully and substantially the grounds of his complaint upon which he seeks a judgment in his favor. In actions upon bonds and notes payable in specific articles, it is necessary for the plaintiff, in order to convert it into a money demand, to allege, clearly and substantially, the failure or neglect of the defendant to perform the contract by the delivery of the specific property in accordance with the terms of the contract, and his own right to recover money consequent upon that failure. In all such cases the obligor or promisor has his election of either alternative—to deliver the property at the time and place specified in the contract, or to pay the money; it is only upon his failure to perform the first alternative that the obligee's or promisee's right to recover the money can accrue; and however clear that right may be, however well grounded his cause of action, he can not recover beyond his allegations of the defendant's nonperformance.”

Ramsay v. McCauley:²⁵ “According to these decisions, then, the

²² *McCauley v. Long & Co.*, 61 Texas, 74; *Sutor v. Woods*, 76 Texas, 403, 13 S. W., 321; *Russell v. Nall*, 79 Texas, 664, 15 S. W., 635.

²³ *Thompson v. Munger*, 15 Texas, 530.

²⁴ *Dallam*, 575.

²⁵ 2 Texas, 192.

fact and rate of interest of South Carolina were the proper subject of an averment, essential to the right of the plaintiff to recover interest in the present case. And not having been averred, can not be supplied by any presumption in favor of the verdict, since no evidence could legally have been admitted of a fact not averred, upon which the plaintiff's right to recover depended. It is not such an omission as can be cured by verdict. "The omission of alleging a matter in the pleadings which is essential to the action is never cured by verdict." 5 Bac. Abr., tit. 'Verdict,' X.; J. J. Marsh, 541."

Paul v. Perez:²⁶ Plaintiff's petition made out a *prima facie* case showing title in him. Defendant by answer set up in nature of a cross-action a superior title in him. Plaintiff did not reply, but undertook in his proof to show facts constituting a forfeiture of defendant's title. The court says: "The greater and most material part of this answer is in the nature of a cross-bill, in which the defendant becomes the actor; and if the plaintiff relied upon the supposed forfeiture, and believed that he had a right to avail himself of it in this action, he should have set up the fact or facts constituting the forfeiture in his answer to this cross-bill or petition of the defendant; or he could, on motion to the court, have amended his petition by inserting the allegation of the forfeiture. The principle that the *allegata* must be broad enough to admit all necessary proof, and that every material fact must be alleged, has been often declared by this court; first solemnly adjudicated in Mims v. Mitchell (1 Texas, 443), and sustained by an unbroken train of decisions from that time down to the present. (See Coles v. Kelsey, 2 Texas, 541; Caldwell v. Haley, Id., 317); and if there was proof without such *allegata*, it should be disregarded. (State v. Thorn, 3 Texas, 499; Wright v. Wright, Id., 168; Carter & Hunt v. Wallace, 2 Id., 206.)"

Denison v. League:²⁷ "There is no rule that has been so stringently enforced in this court as the rule that the *allegata* must be broad enough to let in the proof, and that no evidence, not supported by the *allegata*, can sustain a verdict. This rule has been always considered as essential to our system or jurisprudence, and giving harmony to the system. It was commented on and enforced in the case of Mims v. Mitchell (1 Texas, 443), and in Hall & Jones v. Jackson, and in fact by a train of decisions, without ever having been relaxed in a single instance. The whole petition is so indefinite that it would be difficult to sustain a decree in favor of the plaintiff on any part of it."

Wright v. Wright;²⁸ suit for divorce. "Whether evidence would be admissible under such charges must depend upon the rules in relation

²⁶ 7 Texas, 345.

²⁷ 16 Texas, 409.

²⁸ 3 Texas, 168, 1848.

to certainty in pleading generally, and especially in controversies of this character.

"The statute regulating the subject matter requires a full and clear statement of the cause of action, and such other allegations pertinent to the cause as may be deemed necessary to sustain the suit.

"This full and clear statement must embrace the material facts upon which the complaint is founded, or if any offense is charged, the principal facts constituting this charge, together with the material circumstances of manner, time, and place.

"This explicit statement of facts is necessary, that the defendant may know what he is called upon to answer and be enabled to make the proper defense, and that the tribunal having cognizance of the controversy may be apprised of the matters at issue and be enabled to administer the proper remedial justice. * * *

"The allegations of the petition, tested by the provisions of the statute and the rules of pleading, particularly in controversies of this character, are vicious for the want of specification of facts constituting the offenses, or even averments of a course of misconduct, from which the class of facts relied upon might be inferred.

"The terms of the statute, 'excesses,' cruel treatment and outrages, are conclusions from facts, or are rather compound questions of law and facts; the constituent acts and circumstances of which should be set forth that the court may judge whether, in legal contemplation, they are within the description of the offenses that are by statute good grounds for divorce.

"The defendant is entitled to have the judgment of the court, whether the facts charged in the petition constitute offenses in law, before he can be compelled to proceed to trial on these facts. This right would be totally unavailing, if a general charge, without further specifications, be sufficient to admit evidence of particular facts to substantiate the charge.

"The usual order of procedure would, in fact, be reversed. The evidence and not the pleadings would show the grounds of complaint, and their sufficiency could be determined alone upon the evidence; thus necessarily subjecting the defendant to all the vexation and expense of a trial, whether the facts complained of be legally sufficient to support the action or otherwise.

"Without a specification of the facts constituting the offenses charged, the defendant has no opportunity of invalidating the proof by contrary evidence. He is not informed of the act done or omitted, or of the time, place, or circumstances of the facts to be established by the evidence."

Hendrix v. Nunn:²⁹ "Whenever the plaintiff seeks to impose upon

²⁹ 46 Texas, 148, 1876.

the defendant the character of a trustee *in invitum*, evidently he must allege in his petition the facts from which the court can see that equity and justice require that it should charge upon defendant's conscience the performance of that which is demanded of him. * * * There is merely a bold assertion of fraud, as an inference or conclusion, instead of a statement of facts showing fraud, as is unquestionably necessary."

Texas Pacific Railway Company v. Kirk:³⁰ "The twelfth assignment of error is, 'The court erred in not sustaining the special demurrers to plaintiff's petition.' The only matter urged is that the petition gave the conclusions of the pleader in regard to certain matters. This is true; but the facts upon which the conclusions were based were fully stated, and if true justified the conclusions drawn from them, and the appellant could not have been prejudiced by the ruling of the court." The judgment was affirmed.

Sharp v. Schmidt & Zeigler;³¹ injunction: "It is fully established by our own decisions 'that notwithstanding an illegal writ or service of process a court of equity will not interfere to set aside a judgment until it appears that the result will be different from that already reached. To make this appear the petition should aver matters which amount to a good defense to the original action. The nature of the defense must be given, so that the court for itself may determine the conclusion of law as to whether or not it is a good defense and would procure a different result if proved upon another trial. The plaintiff's oath to such a conclusion is not sufficient.'"

Morrison v. Insurance Company:³² "The appellants by their pleadings undertook to declare the legal effect of certain provisions in the policy sued upon, and making a *fac simile* of the policy a part of the pleading, and the court sustained an exception to so much of it. **In** this there was no error, for the pleadings of parties should state facts, and the averments of legal conclusions drawn from facts are in no manner necessary to the full presentation of the right claimed."

Brown v. Mitchell;³³ suit to set aside will for undue influence. "Appellant excepted specially to so much of the petition as set up undue influence, and the grounds of exception were as follows: 'The petition failed to show the nature of or what fraud or undue influence was used or exercised, or how or in what manner the same was used or exercised in order to procure the execution of such will.' This was overruled. The averment of the petition was: 'Your

³⁰ 62 Texas, 233, 1884.

³¹ 62 Texas, 265, 1884.

³² 69 Texas, 359, 1887; 6 S. W., 605.

³³ 75 Texas, 9, 1889; 12 S. W., 606.

petitioners further allege that said George B. Brown and J. G. Simpson conspired and confederated with themselves and others and used and exercised undue influence over said Lizzie Brown, deceased, in order to fraudulently procure the execution of said instrument in writing.' This was the mere statement of conclusions without the statement of a single fact to support them, and the exception should have been sustained."

Milburn v. Walker,³⁴ suit against husband and wife on account and a written contract. "The petition, after setting forth that the articles were necessities for the wife, her children, and her property, avers that the husband acknowledged in writing the justice of the demand, and promised payment on behalf of the wife. There is no averment that by such promise he or his wife became liable, but that was not necessary. If the promise under the facts forming its consideration created a liability and was such as would subject the separate estate of the wife to its payment, there was no indispensable necessity to aver such liability; that was a conclusion of law—the legal result of the facts stated,—and its averment was not essential to support the action."

Connor v. Saunders:³⁵ "When the pleader does set out the facts particularly he can not change their legal effect by alleging a conclusion of law different from that which the law itself draws."

Law Need Not Be Plead.

This rule, confining the pleadings to a statement of facts, and hence forbidding the incorporation into them of matters of law, is perfectly consistent with the purpose of pleading before announced. This purpose is to inform the court and the adverse party, and it necessarily follows that matters of law need not, and should not, be averred, for, the courts and all litigants are charged with knowledge of all the law. It is therefore a defect in pleading to state, or attempt to state, matters of law. "Law" in this connection includes the Constitution, laws and treaties of the United States government, and the Constitution and laws of the State of Texas. It does not include the laws of other States in the Union, or of foreign governments. If these differ from the laws of Texas, and the pleader desires the benefit of them, he must plead and prove them as other facts, for the court does not know them judicially.³⁶

³⁴ 11 Texas, 339, 1854.

³⁵ 81 Texas, 633, 1891; 17 S. W., 236.

³⁶ *Hutchins v. Flintge*, 2 Texas, 475; *State v. Delesdenier*, 7 Texas, 96; *Huff v. Folger*, Dall., 530; *Hill v. McMermott*, Dall., 419; *Norvell v. Oury*, 13 Texas, 31.

Facts Judicially Known.

The same principle relieves the pleader from the necessity of alleging those facts of which the court is charged with judicial notice. These matters are enumerated and discussed in works on evidence and need not be further discussed here. The rule of pleading is, that any fact of which the law charges the court with judicial knowledge is not required to be plead.³⁷

General Rules of Conduct and Condition.

There is another class of facts which need not be alleged. These are those general rules of conduct or condition which are so nearly universal that the courts presume their existence in every case, and do not require the pleader to aver them; but, on the other hand, require the party desiring to establish the exception to these general rules, or the absence of these ordinary conditions, to aver such exception or such absence and prove it. Take, for an example, the capacity of parties to bind themselves by contract. It is essential to every contract that there shall be competent parties legally qualified to enter into the agreement, but it is not necessary in declaring upon a contract to aver the capacity of any of the parties to it; for capacity is the rule, and incapacity the very rare exception among those who do business, and the law presumes that the parties to any particular undertaking are competent until the contrary is made to appear. If in a particular case the contract sued on had been executed by a competent person, the plaintiff would not be required to plead and prove this; but if the defendant were incompetent, as a married woman or a minor, this defense must be alleged and proved by the defendant in the manner required by law. Another illustration of such presumption is the legality of the subject matter of a contract. While it is true that no agreement is enforceable which is in itself illegal, still in suing on a contract it is not necessary for the pleader to aver the legality, for this is presumed; and if in the particular case the agreement is void because of illegality in itself, or in its consideration, this is a matter of defense.

These presumptions now under consideration, and which relieve the pleader from the necessity of averring the absence of matters of defense, must be distinguished from another class of presumptions which arise only upon the proper averments being made in the pleading and a failure to deny the fact so averred, and which relate only to introduction of evi-

³⁷ *Railway Co. v. Curry*, 64 Texas, 88; *Weaver v. Nugent*, 72 Texas, 279, 10 S. W., 458.

dence. These latter are presumptions with reference to evidence, and do not relieve the pleader from making the averment in the first instance. To illustrate, in a suit against a partnership it is necessary to allege the fact of the partnership, and if this allegation is not made the court can not consider the suit as brought against the partners in their partnership capacity; but when the averment is made, under the statute no testimony need be introduced to sustain the allegation unless the defendant shall deny the fact of the partnership under oath; and so with reference to all matters which must be plead by party desiring the benefit of the facts, as to which the law presents special manner of joinder of issue.

Facts Must Be Fully Stated.

With these exceptions, that is, matters of law, facts judicially known, facts of such general nature or conditions so nearly universal that they are presumed to exist unless specially plead and proven to the contrary, the pleadings must contain every matter that the court should consider in determining the case. No fact not alleged, however important it may be, can be received in evidence or considered by the court.³⁸ It is therefore essential that the pleader should understand thoroughly the nature of his case, the facts which he may be able to prove, and the law governing them, and then that he should incorporate into his pleading every fact essential to his client's right. The court can not go beyond his allegations, and even if testimony were received by the court, it could not legally be considered unless there was appropriate allegation in the pleading.³⁹ This is what is meant by the statement that the pleadings must be full. The rule is enforced for the protection of the court and the adverse party; to disregard it would be to practically repeal the law requiring pleading.

Need Not Anticipate Defensive Matters.

While a pleading must state the facts fully, it is, except in a few dilatory pleas, only necessary to state those facts which will make the pleading *prima facie* good, and it need not go further and anticipate

³⁸ *Mims v. Mitchell*, 1 Texas, 442; *Ramsey v. McCauley*, 2 Texas, 189; *Lemmon v. Hanley*, 28 Texas, 220; *Pacific Express Co. v. Darnell Bros.*, 62 Texas, 639.

³⁹ *Hall v. Jackson*, 3 Texas, 305; *Crisman v. Miller*, 15 Texas, 159; *Tarleton v. Dailey*, 55 Texas, 94; *Grounds v. Sloan*, 73 Texas, 662, 11 S. W., 898; *Cooper v. Loughlin*, 75 Texas, 524, 13 S. W., 37; *Tinsley v. Penniman*, 83 Texas, 54, 18 S. W., 718.

and avoid independent matters which would defeat it if set up by the adverse party.

It is frequently not improper to do this, and sometimes tends to a better understanding of the case, but it is not essential. Care must be taken, however, to distinguish between *independent* defensive matter and matter which is so intimately connected with the plaintiff's cause of action, or the defendant's ground of defense, that an intelligent and full statement of the cause of action or defense can not be made without bringing in and disclosing the matter defeating it. Whenever this is the case, the pleader should set up the matter in avoidance also; otherwise the defensive matter confessed would destroy his pleading. To illustrate: If the plaintiff in a suit for damages for personal injury to himself, caused through defendant's negligence, can state his case without showing contributory negligence on his part, he may do so, and the petition will be good, without denying negligence, but if the facts are such that in stating his own case he, in legal effect, makes a *prima facie* case of contributory negligence against himself, he must then go further and show additional facts which avoid this defense, as that he was placed in sudden and imminent peril by the wrong of the defendant, and acted upon the impulse of the moment, taking what seemed to be the safer course to relieve himself from danger, or that the wrong by the defendant was intentional and willful, etc.⁴⁰

Another illustration is found in suit by an employe improperly discharged. Here the plaintiff need not negative that he could have gotten employment by use of reasonable diligence, this is a defense to be averred by defendant.

Omissions Sometimes Cured by Allegations by the Other Party.

This rule is usually applied in cases in which the objection is made to the introduction of testimony, and in that connection is a very salutary one, as it would be a little difficult to see how a party had been misled by failure to plead a matter which he has himself set up, or be surprised by proof offered in support of his own allegation. So, in ruling upon the admission of testimony, the court may well look to the whole record.⁴¹

⁴⁰ *Railway Co. v. Sheider*, 88 Texas, 152, 30 S. W., 902; *City of Denison v. Sanford*, 2 Texas Civ. App., 661, 21 S. W., 784; *Hollingsworth v. Holshouser*, 17 Texas, 45.

⁴¹ *Hill v. George*, 5 Texas, 87; *Andrews v. Hoxie*, 5 Texas, 171; *Grimes v. Ha-good*, 19 Texas, 246.

The same principles apply when the objection is urged for the first time in motion for new trial or arrest of judgment.⁴²

Quite different questions arise, however, when the party has been vigilant in discovering the defect and prompt to call it to the court's attention by demurrer, and his adversary asks to look to subsequent portions of the pleading containing the demurrer to find allegations with which to patch out his defective averments. There are a few cases, however, extending the rule even this far.⁴³

Another phase of this question is presented in those cases in which the defendant seeks some affirmative relief and many of the facts on which he relies have already been plead by the plaintiff, and the defendant desires to adopt these facts from his adversary and state the additional matters necessary to show his right.

He is permitted to do this, and even if the plaintiff afterwards dismisses his case, his pleadings will still remain in the record for this purpose and can be utilized by the defendant.⁴⁴

This rule can not be invoked on a hearing on demurrer when the pleading demurred to sets out facts which are repugnant to the fact sought to be supplied from the pleading interposing the demurrer. This would not be supplying an omission, but would be contradicting the pleading sought to be aided.⁴⁵

Questions of this sort ought never to arise. It is at best somewhat humiliating to a lawyer to be compelled to confess the defects in his own work, and beg leave to save his client from harm by being allowed to avail himself of his adversary's efforts.

Adoption of Pleading or Parts of Pleadings of Other Parties.

It is often a practical question whether or not facts already in the record can be adopted by a pleader and made parts of his pleadings so as to relieve him from the necessity of setting them out. This is always his privilege; whether he will avail himself of it is a matter of judgment in each case. This adoption may be, and very frequently is, of matters stated by the adverse party. In an action of trespass to try title, the defendant setting up ownership in the lands, or limitation or improvements in good faith, may, and in most cases does, refer

⁴² *Willis v. Lockett*, 26 S. W., 419; *Railway Co. v. Anderson*, 76 Texas, 252, 13 S. W., 196.

⁴³ *Day Co. v. State*, 68 Texas, 537, 4 S. W., 865; *Security Mortgage & Trust Co. v. Caruthers*, 11 Texas Civ. App., 430, 32 S. W., 837.

⁴⁴ *Giraud v. Ellis*, 24 S. W., 967.

⁴⁵ *Biddle v. City of Terrell*, 82 Texas, 335, 18 S. W., 691.

to the land as that described by the plaintiff in his petition without describing it himself. Many other illustrations might be given. The adoption may be of parts of pleadings previously filed by the pleader himself, as by referring back to the original petition or answer, in a supplemental, etc. Or it may be of facts contained in the same pleading, as where the facts have been fully and accurately set out in one count or paragraph, reference may be made to these facts in subsequent counts without necessity of repetition. The rule by which to be guided is to take the method which will most concisely, yet accurately and intelligently, present the case. If this can best be accomplished by repeating the facts, this should be done; if by referring to and adopting former pleadings, this should be done.

Cure of Omissions in Pleadings by Verdict.

As early as 1847 our Supreme Court in discussing this question said:

A fact "not having been averred can not be supplied by any presumption in favor of the verdict, since no evidence could legally have been admitted of a fact not averred upon which the plaintiff's right depended. It is not such an omission as can be cured by verdict. 'The omission of alleging a matter in a pleading which is essential to the action can never be cured by verdict.'"⁴⁶

Later the court adopted this language as expressing the rule: "The verdict or decree cures all defects, imperfections, or omissions in the petition or statement of the cause of action, whether of substance or form, if the issue joined be such as required proof of the facts imperfectly stated or omitted, though it will not cure or aid a statement of a defective title or cause of action."⁴⁷

This has been several times copied.⁴⁸ This seems somewhat ambiguous. Just how all omissions in the statement of a cause of action can be cured by verdicts and still no omission constituting a defect in a cause of action be cured is not very readily apparent.

In *Gillis v. Wofford*,⁴⁹ it is held that a verdict will not cure an omission in a petition if the evidence offered on the point is received over objection of the defendant.

In *Brackett v. Devine*,⁵⁰ it was held that a direct averment of a breach

⁴⁶ *Ramsey v. McCauley*, 2 Texas, 189.

⁴⁷ *De Witt v. Miller*, 9 Texas, 239.

⁴⁸ *Williams v. Warnell*, 28 Texas, 610; *Stansbury v. Nichols*, 30 Texas, 145.

⁴⁹ 26 Texas, 76.

⁵⁰ 25 Texas Supp., 195.

of the contract sued on was essential, and that such omission is not cured by judgment by default.

*Grant v. Whittlesey*⁵¹ is a suit on a note in which there was no allegation of failure to pay. Demurrer was filed but not acted on by the court. Jury was waived and the case was tried before the judge. He found for the plaintiff. The defendant appealed and contended the omission in the petition was fatal. The plaintiff relied on the finding and judgment in his favor to cure the defect. The court says: "A verdict can not cure or supply the failure in a petition to state a cause of action; and omission to act or rely on a demurrer to a petition fatally defective will not prevent a party from availing himself of such defect on appeal or writ of error. * * * The plaintiff has failed to state a cause of action in that he does not aver a breach of the contract sued on; he does not aver that the defendant failed to pay the note, and such failure must be averred to support the judgment."

The latest case directly on the point which I have found is *Schuster v. Friedenthal & Co.*⁵² It is a suit in which the dissolution of a partnership was an essential fact. There was no such direct allegation. The demurrer was waived, but the defect in the petition was assigned as error in the Supreme Court, Judge Gaines says: "It is here insisted that the petition is insufficient because it is not alleged that the partnership is dissolved, and because an action of debt can not be brought by a firm upon an indebtedness of a member to a partnership. If the demurrer to the petition had been insisted upon it may be that it should have been sustained.

"But there having been a verdict in the case without any action on the demurrer, we are of opinion that any defect in the petition has been cured by the verdict. Where there has been a judgment by default upon a petition defective in substance, the defect in the pleading may be taken advantage of upon error, *Grant v. Whittlesey*, 42 Texas, 321; *Brackett v. Divine*, 25 Texas, Supp., 195. But where there has been a verdict a different rule applies.

"A pleading is cured by the verdict when the omitted fact is such that it is presumed that the judge would not have directed the jury to give verdict or the jury would not have given the verdict unless it had been proved. But a verdict will not cure a clear omission of a necessary substantive allegation. *Grant v. Whittlesey*, *supra*. 'The particular thing which is presumed to have been proved must always be such as can be implied from the allegations in the record by fair and reasonable implication.' 1 Chitty Plead., 17 Am. Ed., 705. The

⁵¹ 42 Texas, 320.

⁵² 74 Texas, 53, 11 S. W., 1051.

allegations in the petition under consideration do not very distinctly show a cause of action. But we think every fact necessary to sustain a recovery may be deduced from them by fair implication."

It is difficult to state accurately the result of these decisions. It is clear that the rules applied in testing the sufficiency of the pleading when the point is raised for the first time after verdict are more liberal even than in considering a general demurrer, for in the last case it is said that the demurrer if seasonably interposed should have been sustained. So all such intendments as can be invoked in such cases apply here. The difficulty arises when we undertake to determine how much more liberality shall be extended. Clearly the objection of argumentativeness is cured by the verdict, as the process by which the petition in the last cited case was sustained is just the one prohibited by the rule on that subject. Perhaps it may be correct to say that a verdict will cure all objections to a pleading which are based on matters of form, and all those based on matters of substance which do not involve the entire absence of some essential allegation. That any indirect method of allegation, or any statement, however general, which by any reasonable though liberal construction can be made to include the alleged omission will be held to do so and cure the defect unless it has been called to the attention of the court by an unwaived exception to the pleading or by objection to the testimony; and that a judgment by default does not have the same healing effect, but the rules to be applied to the petition, in seeking to avoid or set aside such a judgment are the same as on general demurrer.

Allegations of Damage.

The damages sought to be recovered must always be stated. Distinction is made between pleading general and special damages. If the damages are such as result from the wrong not only naturally, but necessarily, they are general, but if they result naturally, but not necessarily, they are special.

General damages may be alleged generally in an aggregate sum; special damages must be alleged specially in separate sums for each item.⁵³

If it is desired to recover both actual and exemplary damages, in addition to the facts entitling to the actual, the pleading must contain allegations of every other fact essential to entitle to exemplary dam-

⁵³ Glascock v. Shell, 57 Texas, 224; T. & P. Ry. Co. v. Curry, 64 Texas, 85; Moehring v. Hall, 66 Texas, 240, 1 S. W., 258; E. L. & R. R. Ry. Co. v. Brinker, 68 Texas, 502, 3 S. W., 99; Railway Co. v. Smith, 74 Texas, 276, 11 S. W., 1104; Railway Co. v. Wilson, 79 Texas, 373, 15 S. W., 280; Campbell v. Cook, 86 Texas, 632, 26 S. W., 486; Black v. Calloway, 30 Texas, 237.

ages, and the amount of each kind of damage sought should be stated separately, though failure to do the latter must be objected to by special demurrer.⁵⁴

The Relief Sought.

If the pleading be intended as a basis of affirmative relief by the court, the statement of facts entitling thereto should be followed by an appropriate prayer, and no relief will be granted not coming fairly within the legal import of the prayer. In cases in which there is doubt as to proper remedy, either on account of uncertainty as to the facts or law or both, alternate prayers are permitted.⁵⁵

The prayer, however, must conform to the facts alleged and can not vary the legal effect of such facts, even if the proof should support the prayer if there was no proper allegation of the facts in the pleading to support the proof, the prayer could not supply this omission.⁵⁶

A party setting up facts and indicating therein the purpose for which they are plead, can not, after the evidence is in, place a different construction thereon, and by charges give a different legal effect to his pleading, and make it the basis of action by the court not fairly within the purpose originally designated.⁵⁷

RULES AS TO CERTAINTY.

The facts constituting the cause of action or ground of defense should be stated with such certainty and accuracy as to advise the court and adverse party of the very matters relied upon. The difficulty here is to avoid, on the one hand, statements so general that they do

⁵⁴ *Railway Co. v. Garcia*, 70 Texas, 208, 7 S. W., 802; *Moehring v. Hall*, 66 Texas, 240, 1 S. W., 258; *Kaufman v. Wicks*, 62 Texas, 234; *Wallace v. Finberg*, 46 Texas, 49; *Railway Co. v. La Gierse*, 51 Texas, 203.

⁵⁵ *Mims v. Mitchell*, 1 Texas, 448; *Lucketts v. Townsend*, 3 Texas, 119; *Moore v. Guest*, 8 Texas, 119; *Pinchain v. Collard*, 13 Texas, 334; *Dimmitt v. Robbins*, 74 Texas, 443, 12 S. W., 94; *Fowler v. Stoneum*, 11 Texas, 511; *Chrisman v. Miller*, 15 Texas, 160; *Scott v. Atchison*, 36 Texas, 76; *Hillebrant v. Barton*, 39 Texas, 601; *Railway Co. v. Pfeuffer*, 56 Texas, 74.

⁵⁶ *Milliken v. Smoot*, 64 Texas, 173; *Pridgin v. Strickland*, 8 Texas, 436; *Denison v. League*, 16 Texas, 407; *Trammell v. Watson*, 25 Texas Supp., 216; *Silberberg v. Pearson*, 75 Texas, 290, 12 S. W., 850; *Garvin v. Hall*, 83 Texas, 301, 18 S. W., 731; *City of Houston v. Emery*, 76 Texas, 285, 13 S. W. 264; *Zadick & Wartelsky v. Shafer, Swartz & Co.*, 77 Texas, 504, 14 S. W., 153.

⁵⁷ *Ellis v. Singletary*, 45 Texas, 47.

not convey the proper information, and on the other, going into such details as unnecessarily encumber the record.⁵⁸

The statements should not be so indefinite and vague as to leave room for reasonable doubt as to the legal import of the pleading nor as to the facts upon which the pleader relies to sustain his case; neither should they be so specific as to set out matters of evidence.

Practical common sense and precedents, when the latter can be found, are the safest guides.

The following cases furnish valuable guides in this matter.

In *Mims v. Mitchell*⁵⁹ the rule is expressed in these words: "The object of pleading is to apprise the court and the opposite party of the facts upon which the pleader intends to rely, as constituting his cause of action or ground of defense. And the averments should set forth the facts relied on with such precision, clearness, and certainty as to apprise the opposite party of what he will be called upon to answer, and what is intended to be proved, so that the evidence introduced may not take him by surprise. Such certainty is essential in order that the facts relied on by either party may be understood by the party who is to answer them, by the jury who are to ascertain their truth, and by the court who is to give judgment upon them. Where there is not such certainty, objections to evidence ought to be sustained; for a party ought not to be permitted to prove what he has not alleged."

In *Caldwell v. Haley*,⁶⁰ the Supreme Court says: "In our pleadings, it has uniformly been held essential to state the facts on which the party intends to rely as constituting his cause of action or ground of defense, with such circumstantial accuracy as to apprise the opposite party of what is intended to be proved at the trial. (*Wright v. Wright*, decided at present term; *Mims v. Mitchell*, 1 Texas, 443; *Carter & Hunt v. Wallace*, 2 Texas.) That the petition in the case before us does not contain the requisite accuracy and certainty, is manifest. It apprises the defendant of no one *fact* going to constitute the plaintiff's cause of action, with time, place, quantity, value, or any other circumstances of identity or certainty. It can, in no just sense, be said to contain a statement of the plaintiff's case, so set forth as to apprise the defendant of the real nature of the plaintiff's demand, and of the facts intended to be proved. * * *

"The petition in this case seems to have been framed in imitation of a *declaration* in the English system, embracing the *common counts*; and it would perhaps be difficult for one not acquainted with that system to conjecture what the pleader really had in view, or where he

⁵⁸ *Gray v. McFarland*, 29 Texas, 163; *Stansbury v. Nichols*, 30 Texas, 148; *Mayton v. Railway Co.*, 63 Texas, 77.

⁵⁹ 1 Texas, 446.

⁶⁰ 3 Texas, 318, 1848.

had found the model of a petition by which so effectually to disguise and conceal, under the pretense of stating, the real facts and circumstances of his case. But in our pleading the *common counts* are unknown. Every action is a special action on the particular case; and the petition must be framed in respect to the particular grievance for which the party seeks redress. This has not been done in the present instance, and we are of opinion that the petition is defective and insufficient.

"There doubtless will be cases in which it will not be practicable to state and describe the cause of action with entire circumstantial exactness and accuracy, or to attain more than reasonable certainty, or a certainty to a *common intent*, as it is sometimes rather indefinitely, though technically, expressed in the books. Such was the case of *Frosch v. Swett*, decided at the last term. In that case, however, the plaintiff confined his statement to a single transaction, and being an administrator, and not presumed to be conversant with the particulars of the dealing of his intestate, it was held that his petition was sufficient without a statement of the circumstances out of which the alleged indebtedness arose. It was manifest that had the plaintiff not been permitted to recover upon the statement of the case contained in his petition, he could never have recovered at all, and a meritorious cause of action must have been defeated. For to have required greater particularity and certainty would have been to have required an impossibility in that case, and would have defeated the ends of justice, and, of course, the intention of the law."

There are a few matters on which precedents may be said to have ripened into rules. This is true as to time, place, quantity and value. Neither of these is ordinarily required to be stated with precision, however, in those exceptional instances in which the time or place, etc., is descriptive of the particular thing in suit, or there is some special right dependent upon it, the averments must be specific and accurate.

Certainty in Allegations of Time.

Time is rarely considered as descriptive, and an event may be charged to have occurred on one date and be proven on another without occasioning any legal variance between the proof and the allegation. The limits to the difference between these dates is that the date must not be stated as so long before suit that the claim would appear to be barred by limitation at time of bringing suit or filing plea, nor as occurring after suit brought. The relative time of different events is also to be observed and they should be alleged as occurring in

their proper chronological order, particularly when the later events depend on or result from the earlier.⁶¹

Time may, however, sometimes be descriptive. If a suit is on a written contract, its date is one of the chief means of identifying it and distinguishing it from other contracts of a similar nature. In such cases much care must be observed in stating the time. Formerly it was held that a difference in the date in the alleged instrument and the one offered in evidence was always fatal. The later and better rule is that this is so unless from other descriptive matters stated in the pleadings it is clear that a reasonable person could not have been misled or deceived by the improper statement; in which case the variance will be disregarded.

Again, if the legal validity of the act, or the rights of the parties under it, are affected by the date, it must be proved as alleged. There are some statutory offenses of a continuing nature as to which the law provides that each day that the violation exists shall be a separate offense, and occasionally similar provisions are made as to penalties recoverable in civil suits. In such cases the day on which the act was done is an essential element of the offense, and must be correctly stated, whether the proceeding is a criminal prosecution for the crime, or a civil suit for the penalty.

The same is true in cases involving violation of statutes regarding the Sabbath, usually known as Sunday laws, whether the issue arise in a criminal prosecution or a suit on a contract which is sought to be avoided because of illegality for violating such statute.

Certainty in Allegations of Place.

It is also an established rule that large latitude is allowed in stating the place at which an act or event occurred. Usually it can matter but little to the court or either party just where a wrong was committed,⁶² but if there be anything in the case which makes locality descriptive of the act, or an element in the right violated or injury done, it must be correctly stated.⁶³ Thus where venue is fixed away from the defendant's residence by the place of performance of a written contract, place becomes an important element in the plaintiff's right to maintain his suit in the court selected by him, and must be properly stated.

⁶¹ Andrews' Stephens on Pleading, 333; Gould on Pleading, 3 ed., sec. 63, et seq.; 1 Greenleaf on Evidence, secs. 56, 61.

⁶² Railway Co. v. Kuehn, 2 Texas Civ. App., 210, 21 S. W., 58; Brown v. Sullivan, 71 Texas, 470, 10 S. W., 288.

⁶³ Railway Co. v. Simonton, 2 Texas Civ. App., 558, 22 S. W., 285.

Again, in local actions of all kinds, that is, suits for land, or for trespass or injury to it, the place is, of course, an essential part of the case and must be properly described, and a variance will prevent a recovery. So if the nature of the place at which the alleged wrong occurred will affect the relations and right of the parties, it must be properly plead. As in suits against railroad companies for injury to person by collision with train. Different rules of law apply according to whether the injury occurred at the crossing of a public road and the railroad track, or on the track away from the road, and here the locality must be truly given.⁶⁴

Certainty in Allegations of Quantity.

Quantity is not ordinarily required to be stated with exactness. If suit be brought for a flock of sheep, the exact number in the flock is not essential to the identity of the flock, or the plaintiff's right in it, nor the wrong done by the defendant and so it may be given in general terms, care being taken to have the number alleged as large as the real number, and recovery can be had of as many as the plaintiff shall show.⁶⁵

Certainty in Allegations of Value.

The same rules apply as to value. It should always be alleged, but is not regarded as descriptive of the subject matter of the suit, and may therefore be proved just as laid or for any other amount; the recovery being limited to the sum claimed. If the proof should go beyond that amount, that is, if suit be brought for conversion of property valued at one thousand dollars, and the proof shows that sum or less, the recovery would be limited to the proof, but if the proof be beyond that sum, the recovery would be limited by the pleadings.

The recovery can not go beyond an amount covered by both pleadings and proof.

There was an old rule that if suit was brought for a number of separate articles or things, and only an aggregate value was given, and the proof showed a different number, there could be no apportionment of the alleged value and *pro rata* recovery, but this seems to be no longer the case. It is always proper and almost always necessary to

⁶⁴ *Borrow v. Philleo*, 14 Texas, 345; *Wilson v. Adams*, 15 Texas, 323; *Steinbeek v. Stone*, 53 Texas, 386; *Roche v. Lovell*, 74 Texas, 194, 11 S. W., 1079; *Lumpkin v. Sillimon*, 79 Texas, 165, 15 S. W., 231.

⁶⁵ *Railway Co. v. Edwards*, 78 Texas, 307, 14 S. W., 607.

state some value for the thing sued for or about, and if there are several distinct things, as a number of animals, separate value should be stated as a certain sum each, or if of variable values this should be stated. If there is a quantity of any commodity, such as a number of bales of cotton or bushels of wheat, the value should be alleged, per pound or bushel, and also in the aggregate.⁶⁶

Certainty as to Thing Sued for.

The *res*, or thing for or about which the suit is brought, should be described with such certainty as will enable the court and the adverse party to distinguish it readily from other similar things.⁶⁷ Ordinarily this is not difficult, though sometimes it is impossible. The description must be given according to the circumstances of the case. If the facts are such that it can be identified clearly this should be done; if they will not admit of this, then the best approach to it which the facts will admit, accompanied by a statement of the reasons why better description is not given, will be sufficient. Sometimes general description, as certain articles of a certain kind, quantity and value, situated at a designated place, at a specified time, will answer, but these general indefinite allegations are always to be avoided if reasonable care and diligence can enable the pleader to do so. These rules apply to real and personal property, to corporeal or incorporeal rights.^{67a}

Videlicet.

At common law when the pleader was not certain as to his proof as to time, place, quantity, value, etc., he plead the matter with a *videlicet*; that is, he would precede the specification of quantity, etc., with a "to wit." This is not required in our system and the same latitude is allowed as to proof here without the "to wit" that was permitted under the common law with it.⁶⁸

⁶⁶ Gillies v. Wofford, 26 Texas, 77; Blakely v. Duncan, 4 Texas, 183; Hooser v. Kraeka, 29 Texas, 451; Stroop v. McKinzie, 38 Texas, 133; Railway Co. v. Wallace, 74 Texas, 581, 12 S. W., 227.

⁶⁷ Forbes v. Moore, 32 Texas, 196.

^{67a} Schneider & Davis v. Ferguson, 77 Texas, 572, 14 S. W., 154; Beck & Co. v. Avondino, 82 Texas, 315, 18 S. W., 690.

⁶⁸ Railway Co. v. Witte, 68 Texas, 295, 4 S. W., 490.

Allegations of the Rights of Claimant.

The rights of the claimant in the matter in litigation must be stated clearly and correctly. The recovery can not be of a larger right than is claimed, though if the right claimed be greater than that proved, the latter may be recovered.

Rights Under Contract.

When the right depends upon a parol contract, this must be set up truly according to its legal tenor and effect, and everything necessary to show its validity and the plaintiff's interests thereunder must be stated.

If the right depends on a written contract, the same rules apply. In such cases there is double opportunity for uncertainty and misdescription,—first, as to the identity of the contract, and second, as to the legal effect of it. In order to avoid these difficulties it is not necessary to set out the instrument *in haec verba*, nor make it an exhibit, but its legal effect and substance must be truly averred. As to the first, it seems upon principle and weight of authority that any description which is reasonably sufficient to identify it, and which will give the adverse party such information regarding it as would prevent a reasonable person from being misled or surprised, is sufficient.

In the case of *McClelland v. Smith*,⁶⁹ the Supreme Court says: "There are many other cases that might be referred to on this subject; we do not, however, deem it necessary to examine them; our object has been to ascertain, if possible, whether the decisions had established any principle on which we could repose in disposing of the question of variance in the multiform aspect in which such misdescriptions may be presented. We believe the above authorities resolve into this principle: *that if the misdescription will tend to mislead and surprise the adverse party, it should be noticed by the court; if not, it may be disregarded.* This is believed to be a reasonable and sensible rule—one that can not work an injury to either party, and eminently calculated to harmonize the administration of law with the justice of the case."

In *May & Co. v. Pollard*,⁷⁰ the defendant relied on a receipt declared on as dated "Oct. 25, 1854." The receipt offered in evidence corresponded in all respects except the date was "Oct '54." Held, no variance; the plaintiff could not have been surprised.

In *Hays v. Samuels*,⁷¹ "It is claimed that there is a fatal variance in some of the acceptances as described in the account as to the names of the parties in whose favor the same were drawn. To constitute a

⁶⁹ 3 Texas, 213, 1848.

⁷⁰ 28 Texas, 677.

⁷¹ 55 Texas, 563.

variance the misdescription must be such as to mislead the adverse party. "McClelland v. Smith, 3 Texas, 210. The variance insisted on it is clear is not such as could have misled or surprised the plaintiff in error."⁷²

The Texas case apparently strongest against this position is *Brown v. Martin*.⁷³ The suit was on a note declared on as for three hundred and fifty-six dollars. In the body of the note, the last word stating the amount was blotted in some way, but looked like "fix." The margin gave the amount in figures as \$355. There was no explanation of the discrepancy or the condition of the note in the pleadings. The introduction of the note was objected to because of the variance. The Supreme Court held the variance, in the absence of explanation in the pleading to be fatal. This decision was by a most excellent court and is entitled to great consideration, but it does not seem to be in line with the latter authorities.

*Shipman v. Fulcro*d,^{73a} on casual reading, seems to hold to the more narrow rule, but closer investigation will show this to be a mistake. The variance there was in the middle initial of the name of one of the makers of the note, but there was another man in the community of the name alleged. The party bearing that name was not sued. The other payor objected and alleged that he had good defenses against the note as offered in evidence which were not available against the note declared on. This, of course, made the variance a most material one, and brings the case clearly within the rule announced. This is clearly pointed out by Judge Willie in the opinion in *Wiebusch & Patterson v. Taylor*,⁷⁴ "This court held in the case of *McClelland v. Smith*, 3 Texas, 210, that to constitute a fatal variance, the misdescription must be such as to mislead or surprise the adverse party, otherwise it should be disregarded by the court. This is held to be the rule even where the plaintiff has, as in this case, assumed to give an exact copy of the note. The same stringent rule as to variance, it is said does not obtain in this country as is enforced in the English courts.

"In accordance with this decision—and not in opposition to it—is the case of *Shipman v. Fulcro*d, 42 Texas, 248. There the variance was in the initial letter of the middle name of one of the makers of the note. The petition styled the makers, 'S. W. Walker and E. Shipman.' The note produced in evidence was signed by S. P. Walker and E. M. Shipman. The defendant Shipman objected to the admission of the note for this variance, and stated in his bill of exceptions

⁷² To same effect are *Smith v. Shinn*, 58 Texas, 3, and *Bank v. Stephenson*, 82 Texas, 435, 18 S. W., 583.

⁷³ 19 Texas, 344.

^{73a} 42 Texas, 248.

⁷⁴ 64 Texas, 56.

that S. P. Walker and S. W. Walker were different men; and that the notes were not the same but different instruments; and that he had a good and valid defense to the note signed S. P. Walker and E. M. Shipman. It was apparent, therefore, that the admission of one note due from defendant under a suit upon another note due from him was calculated to mislead and surprise him, and this brought the case within the rule of *McClelland v. Smith*, *supra*. A defendant called upon and preparing himself to defend one demand can not have a different one sprung upon him at the trial, and is justly entitled to claim the variance under such circumstances. Besides the variance there was in the name, and hence in matter in some measure descriptive of the note sued on. None of the authorities cited to sustain the opinion of the court are cases of such immaterial variance as the present discloses, but relate to a variance in the sum, magnitude, date, duration or terms of the note of an important character. We think the court did not err in admitting the note in evidence."

As stated above, it is not essential in alleging the rights or liabilities of parties under a written contract, to set it up in *haec verba*, nor make it an exhibit, but its legal effect and substance must be given correctly. If a mistake is made by the pleader, either in his interpretation and construction of the paper, or in his attempt to express his thought on that question, so that he describes in his pleading a contract different in legal tenor and effect from that offered in evidence, the testimony will not be received, hence great care must be taken both in forming a correct judgment as to the import of the instrument, and in expressing that judgment in pleading. If its legal effect be a matter of doubt, it is always safer to set out the contract literally.⁷⁵

If the contract is lengthy and its parts divisible, the pleader need declare on only those parts which directly relate to the matter in controversy. If the contract be conditional, that is, if the plaintiff is bound to do anything as a condition precedent to defendant's liability, he must aver performance by him. If the obligation on him is concurrent with the defendant's, he must aver readiness, willingness, and ability to perform at the proper time and place.⁷⁶

In addition to the statement as to the effect of the contract, the pleading should show clearly the party's connection therewith and interests thereunder.

⁷⁵ *Wooters v. Railway Co.*, 54 Texas, 298.

⁷⁶ *Holman v. Criswell*, 13 Texas, 42; *Von Norman v. Wheeler*, 13 Texas, 319; *Williams v. Edwards*, 15 Texas, 41; *Mitchell v. Shepperd*, 13 Texas, 484; *Kirkland v. Little*, 41 Texas, 459.

Rights not Dependent on Contract.

But little difficulty is ordinarily found in setting up rights purely personal, but if the right involved be of a peculiar nature depending on special facts, as suit for an office, these facts must be set up.

If the right grow out of any special personal relations, as a parent's right to recover for injuries to the minor child these must be averred with clearness and certainty.

If the right is one *in rem*, or property right, it should be so stated. It is not, however, necessary to state the facts going to make up the title, but the general allegation of ownership is all that is necessary.

Where the petition avers a joint right in two or more, a recovery can not be had on proof of a several right in one of them or in both.⁷⁷

Where the suit is for conversion of personal property by one claiming to be the sole owner, he can not prove joint ownership of the property in himself and another.⁷⁸

A suit for commissions for sale of land to one person will not be sustained by proof of sale to another.⁷⁹

When an agent has effected a sale, and drawn for his commissions on his principal, and the bill is not paid, and the agent sues on the bill and fails in the proof on that, he can not under such pleadings recover for his commissions, no proper allegations being made.⁸⁰

Where a note was made payable to two persons, and one by parol parted with his title and interest to his copayee, and he then indorsed the note to a third party and he sued on the note in his own name, alleging that he was the "owner, holder, and assignee," the note was offered in evidence and objection was made that the indorsement of one payee was not good, and the plaintiff offered to prove the parol transfer to his indorser, the proof was rejected because not corresponding with the allegation, the court saying: "We have repeatedly declared that one of the most essential and peculiar advantages of our system of practice consisted in the rule that the *allegata* and *probata* must agree, without regard to inferences and presumptions tolerated under the common law pleading. We would hold a relaxation or departure from this rule as a most dangerous encroachment on our system, and if permitted to go unreversed would become a precedent for further encroachments, and might terminate in the gradual introduction of much of the fiction of the common law declaration and

⁷⁷ Longcope v. Bruce, 44 Texas, 437.

⁷⁸ Stackley v. Pierce, 28 Texas, 334.

⁷⁹ Armstrong v. O'Brien, 83 Texas, 646, 19 S. W., 268.

⁸⁰ Tinsley v. Penniman, 83 Texas, 54, 18 S. W., 718.

pleading that was obviously intended to be repudiated and avoided by the organization of our system of jurisprudence.”⁸¹

The same general rules apply to the statement of the violation of the right by the defendant. A number of cases bearing on this have been cited and quoted from under head “Facts,” *supra*, which may be profitably consulted.

If the alleged wrong be a breach of contract, written or parol, the averments should show the defendant’s duty under the contract and his failure to perform. If the wrong be personal, the facts constituting the violation should be stated with reasonable certainty. If the wrong affect some property right, the acts or omissions resulting in the injury, and the connection therewith, and responsibility therefor, of the party sought to be charged, should be alleged.

Allegations of Negligence.

There seems to be some doubt in the authorities as to the proper manner of alleging negligence, and the cases are hard to reconcile on it. On principle, negligence is undoubtedly a mixed question of law and fact, and the general statement that the party complained against has been negligent is no more an allegation of fact than a similar charge of fraud would be. But if this point were conceded, and it were taken to be an allegation of fact, it is not certain and accurate, and gives neither the court nor the adverse party any information as to the real ground of complaint. As a legal term, it embraces alike heedless omissions and intentional wrongs, acts of omission and commission; and a charge of negligence is no more specific than the familiar formula, “We have done those things which we ought not to have done, and have left undone those things which we ought to have done,” and on principle can not be good pleading.

In the first Texas case involving this question, *Young v. Lewis*,⁸² it was held that facts constituting negligence could not be considered unless there were appropriate allegations. The record shows, however, that there was no attempt to plead negligence at all in the case.

In *Gulf, Colorado and Sante Fe Railway Company v. Smith*,⁸³ the averment is, “and while plaintiff was so lawfully in defendant company’s said car as a passenger therein, through the gross negligence and carelessness and default of said company, its agents, servants, and employes, said car was run off the track and thrown from the road-bed of said railroad and turned over from the embankment thereof.

⁸¹ *Roseborough v. Gorman*, 6 Texas, 314.

⁸² 9 Texas, 77, 1852.

⁸³ 74 Texas, 276, 11 S. W., 1104.

* * * And plaintiff avers that his said injuries were caused and occasioned by the gross negligence, carelessness, and default of the defendant company, its agents, servants, and employees."

The defendant filed a special exception to the petition because there was no specific charge of negligence. This demurrer was overruled. The Supreme Court sustained this ruling on the doctrine that the pleadings need never go beyond what is required to be proven, and that under the law applicable between passengers and carriers, the derailment of a car is sufficient proof of absence that high degree of care required for the passenger's safety, and no further evidence would be required, and hence as between such parties this averment was good.

In the later case of *Missouri Pacific Railway Company v. Hennessy*,⁸⁴ the Supreme Court, through Judge Collard, commissioner, says:

"It is elementary and statutory in this State that the petition shall set forth 'a full and clear statement of the cause of action—that is, the facts which constitute the cause of action.' Rev. Stats., art. 1195; *Ramsey v. McCauley*, 2 Texas, 189; 11 Texas, 329; 28 Texas, 545; 22 Texas, 609; 24 Texas 157. This is necessary in order to apprise the opposite party of the facts that are expected to be proved. A mere abstract proposition that the defendant was guilty of negligence which resulted in injury to plaintiff would not be sufficient; the act done or omitted constituting negligence must be averred and proved. Hence it follows that an act done or omitted which is relied on to establish negligence must be alleged or proof of it will not be allowed.

"Where from the nature of the case the plaintiff would not be expected to know the exact cause or the precise negligent act which becomes the cause of an injury, and where the facts are peculiarly within the knowledge of the defendant, he would not be required to allege the particular cause, but it would be sufficient to allege the fact in a general way, as that there was a defect in the machinery or structure, or want of skill in operating on the part of its servants, and some such fact as would give the defendant notice of the character of proof that would be offered to support the plaintiff's case."

The question again arose between a passenger and carrier in *Gulf, Colorado and Santa Fe Railway Company v. Wilson*.⁸⁵ Judge Stayton says: "An exception to the petition on the ground that it did not state the particular acts of negligence which caused the derailment of the car and injury to appellant was overruled and this is assigned as error.

"This question was considered in *Railway Company v. Smith*, 74 Texas, 276. In that case, as in this, the averments of the petition were in substance that the car in which the plaintiff was, was derailed

⁸⁴ 75 Texas, 155, 12 S. W., 608.

⁸⁵ 79 Texas, 371, 15 S. W., 280.
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through the negligence of the railway company and its servants, and thus the plaintiff was injured.

"This was held sufficient, and the reasons for this ruling, as well as the citation of cases supporting it, will be found in that case.

"There are some expressions in the opinion in *Railway v. Hennessy*, 75 Texas, 155, which may seem to lead to a contrary conclusion, but an examination of the case will show that the question in it was whether the plaintiff should have been permitted to prove an act of negligence not alleged, when he had alleged that the accident resulted from other specific acts of negligence."

In the still later case of *Texas and Pacific Railway Company v. French*,⁸⁶ the question was presented whether a plaintiff who had clearly specified several acts of negligence as the cause of his injuries could, in addition to those alleged, prove other acts not alleged. It was held that he could not.

The true rules would seem to be these: That a general charge of negligence is an allegation of a mixed matter of law and fact, and ought not to be good, particularly against a special demurrer. That in pleading negligence the general rule applies that no more need be plead than is required to be offered in evidence, and hence when there is some special relation and duty between the plaintiff and defendant, such as common carrier and passenger, that the pleader need only aver such general facts as are sufficient to prove the violation of such special duty, but that in every case the proof must conform to and be limited by the allegations of negligence as made in the pleadings.

Statutory Requirements as to Certainty.

There are some statutory requirements regarding certainty in pleading which must, of course, be observed.

Payment.

"In every action in which a defendant shall desire to prove any payment, counterclaim or set-off, he shall file with his plea an account stating distinctly the nature of such payment, counterclaim, or set-off, and the several items thereof; and on failure to do so he shall not be entitled to prove the same unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof."⁸⁷

Though this section names only the defendant, it applies equally to

⁸⁶ 86 Texas, 96, 23 S. W., 642.

⁸⁷ Rev. Stats. 1895, art. 1266.

the plaintiff when the defendant has become the actor by cross-action and the plaintiff desires to interpose any of the specified defenses to the cross-action.⁸⁸

Accounts.

"In all accounts, except those between merchant and merchant as aforesaid, their factors and agents, the respective times and dates of the delivery of the several articles charged shall be particularly specified, and limitation shall run against each item from the date of such delivery, unless otherwise specially contracted."⁸⁹

These statutes will be further discussed in considering the essentials of petitions and answers.

Facts Peculiarly Within Knowledge of Adverse Party.

The pleader is relieved from the necessity of using the degree of accuracy and certainty which would be required under other circumstances when the facts are not known to him and are peculiarly within the knowledge of the other party.⁹⁰

Where this excuse is relied on it must be stated in the pleading.⁹¹

Relaxation of the Rule to Prevent Prolixity.

It is said that there is a relaxation of the rules as to certainty, when to insist upon them would result in great prolixity; but this doctrine, if true, should never be resorted to except in extreme cases really requiring its application. It should never be made an excuse for sloth and carelessness in the preparation and presentation of a case.⁹²

Relaxation Growing Out of the Nature of the Subject.

No further particularity is required than the nature of the thing, and the circumstances of the pleader, admit of. As in describing goods, etc., constituting the stock of a mercantile establishment, not in

⁸⁸ Rev. Stats. 1895, art. 1192.

⁸⁹ Rev. Stats. 1895, art. 3355.

⁹⁰ *Railway Co. v. Easton*, 2 Texas Civ. App., 380, 21 S. W., 575; *Railway Co. v. Smith*, 74 Texas 276, 11 S. W., 1104; *McFarlan v. Mooring*, 56 Texas, 118.

⁹¹ *Schneider & Davis v. Ferguson & Son*, 77 Texas, 572, 14 S. W., 154.

⁹² *Andrews' Stephens on Pleading*, 368.

possession of the pleader or his client, and of which no inventory is procurable, he may use general terms.⁹³

Matters not constituting the gist of the action, but which are merely aggravation, extenuation, or inducement, need not be alleged with the same exactness and particularity as the more important and controlling.⁹⁴

Exhibits.

There seems to be some uncertainty as to the use and purpose of making exhibits to pleading and the aid which they may render in construing it. The first distinction to be kept in mind is between instruments upon which the right claimed in the pleading is founded, and those which are evidence of collateral matters. The former may be made exhibits to the pleading declaring on them; the latter can not be made exhibits at all. The effort of the pleader to do so by attaching the paper or copy and referring to it is unavailing.⁹⁵

While exhibits of the kind permitted may be made, they are to aid the pleading by making more certain and readily understood allegations contained in the pleading, and can not supply the place of an omitted fact.⁹⁶

RULES AS TO DIRECTNESS.

"It is an elementary principle that the pleader must state the facts of his case by averment direct and positive, and not leave them to be deduced by argument or inference."⁹⁷

This rule is often expressed by saying that a pleading must not be argumentative. This is somewhat ambiguous, but is held to mean that

⁹³ Stephens on Pleading, 375; Chandler v. Mukling, 22 Texas, 37; Bourcier v. Edmondson, 58 Texas, 675; Hurst v. Mellinger, 73 Texas, 188, 11 S. W., 184; Fagan v. McWhirter, 71 Texas, 567, 9 S. W., 677; Veek v. Holt, 71 Texas, 715, 9 S. W., 743; Hamburg v. Wood & Co., 66 Texas, 168, 18 S. W., 623.

⁹⁴ Andrews' Stephens on Pleading, 378.

⁹⁵ Rule 19 for District and County Courts.

⁹⁶ Randall v. Rosenthal, 31 S. W., 823; Beal v. Alexander, 6 Texas, 537; Thompson v. Eanes, 32 Texas, 194; Spencer v. McCarty, 46 Texas, 213; Tucker v. Anderson, 25 Texas, 159; Burks v. Watson, 48 Texas, 115; Pool v. Sanford, 52 Texas, 635; Texas & St. L. Ry. Co. v. Ross & Co., 62 Texas, 447; Longley v. Caruthers, 64 Texas, 288; Dunlap v. Yoakum, 18 Texas, 583; Milliken v. Callahan Co., 69 Texas, 206, 6 S. W., 681; Freiberg v. Magale, 70 Texas, 118, 7 S. W., 684; Wyne v. Bank, 82 Texas, 378, 17 S. W., 918.

⁹⁷ Thompson v. Munger, 15 Texas, 529; Seeligson v. Hobby, 51 Texas, 147; Veek v. Holt, 71 Texas, 715, 9 S. W., 743; Duck v. Peeler, 74 Texas, 268, 11 S. W., 1111.

the pleading must not be so drawn that any material fact is left to inference or deduction, or to be argued from those facts stated, but each material issuable fact should be averred positively and directly.

RULES AS TO CONSISTENCY.

At common law great stress is laid upon the consistency of pleadings. This was, of course, absolutely essential in a system which permitted only one issue and made the whole case depend on its decision. But in Texas very different principles apply, and the plaintiff or defendant may present his facts in as many different groupings, or make as many independent presentations of them as he sees fit. It is not at all necessary that these several presentations be consistent, and indeed the very purpose of this privilege would be defeated if consistency were required. So that it is no objection to a pleading that one count in it contradicts another.

The rule requiring consistency, however, does apply to the different allegations in the same count. These must be harmonious and stand together, but count one and count two may be absolutely irreconcilable and the pleading still good.⁹⁸

These inconsistent pleas can not be used in evidence to disprove each other.⁹⁹

Each count should be consistent with itself and must be tested by its own averments.¹⁰⁰

FACTS MUST BE ACCORDING TO TESTIMONY.

The facts stated must truly represent the case and correspond to the proof to be offered. However good the cause of action or defense of the litigant may be, it is of no avail to him unless it has been plead. Even if the facts should be in evidence they would avail nothing, for pleading and proof are both necessary, they must correspond, and the recovery can only be based upon them both.

The usual formula for expressing this rule is that: the *allegata* and the *probata* must correspond. If they do not, the variance is fatal as

⁹⁸ Hillebrand v. Booth, 7 Texas, 499; Fowler v. Davenport, 21 Texas, 627; Duncan v. Magette, 25 Texas, 255; Smith v. Sublett, 28 Texas, 169; Lemmon v. Hanley, 28 Texas, 220; Ex. Print. Co. v. Copeland, 64 Texas, 357; Welden v. Texas M. Co., 65 Texas, 487; Young v. Kuhn, 71 Texas, 651, 9 S. W., 650; Railway Co. v. Whitley, 77 Texas, 130, 13 S. W., 853.

⁹⁹ Duncan v. Magette, 25 Texas, 255.

¹⁰⁰ Lemmon v. Hanley, 28 Texas, 220; Railway Co. v. Whitley, 77 Texas, 130, 13 S. W., 853; Hillebrand v. Booth, 7 Texas, 499.

an objection to the testimony when offered, and if it is improperly received, through inadvertence or error, it can not be the basis of judgment by the court.

The authorities previously cited establish this proposition so fully and clearly that it seems almost useless to cite others. Still, a few of the most direct may not be out of place as illustrating the rule.

Beginning with *McKinney v. Bradbury*,¹⁰¹ we find this statement by the Supreme Court of the Republic: "By a well settled rule of practice as old as the law itself, the party making the averment must show that the *allegata* and *probata* must correspond."

Again, in *Hamilton v. Butler*,¹⁰² the same court, speaking of the plaintiff's claim or right to recover on a cause of action proved but not plead, says: "He can not call upon this court to give judgment upon issues never made in his pleadings in the court below. He can not expect to recover of the defendants upon allegations he has never called upon them to answer."

In *Mims v. Mitchell*,¹⁰³ which is so often cited on questions of pleading, the Supreme Court of the State says: "The proof must be according to the allegations of the parties, and if proofs go to matters not within the allegations, the court can not judicially act upon them as a ground for its decision, for the pleadings do not put them in contestation. The *allegata* and *probata* must reciprocally meet and conform to each other."

In *McGreal v. Wilson*,¹⁰⁴ the plaintiff sued for a certain sum as the contract price for services rendered, for which his petition was good; he was held not entitled to recover the reasonable value of his services on a *quantum meruit*, though his proof fully sustained the latter cause of action. Here the services were the same in the pleadings and proof, but the pleading declared on a contract with express terms as to amount to be paid, and the proof did not show such a contract, but one in which the agreement was to pay, not a fixed sum, but so much as the services were reasonably worth, usually called an implied contract. The court held the variance fatal and that the plaintiff could not recover.

This is also true in suits for goods sold. The contract must be proved as alleged. Proof of express contract will not support an allegation of an implied; nor will proof of an implied contract support an express. This doctrine was recognized and enforced in *Gammage v. Alexander*,¹⁰⁵ in these words:

¹⁰¹ *Dallam*, 441, 1841.

¹⁰² *Dallam*, 576, 1844.

¹⁰³ 1 *Texas*, 448, 1846.

¹⁰⁴ 9 *Texas*, 426, 1853.

¹⁰⁵ 14 *Texas*, 414.

"Appellees declared upon an express contract, and there is no plainer rule of law than that they must be held to their allegation, and proof of an implied contract will not sustain their allegations."¹⁰⁶

In instances of this kind, unless the proof is all consistent and positive, the pleader should present both phases of the question by alleging express and implied contracts in different counts.

A petition alleging a contract between the plaintiff on the one side and three parties on the other is not sustained by proof of a contract made between plaintiff and two of the three parties alleged.¹⁰⁷

In *Parker v. Beavers*,¹⁰⁸ the court says: "There is no principle of law more clearly settled than that a plaintiff in a court of equity as well as at law must recover, if at all, upon the identical case on which he has based his right to recover in stating his cause of action."

The same principle applies in cases in which the defendant undertakes to set up new matter in avoidance.

DUPLICITY.

At common law it is imperative that the pleadings be conducted so that the case may ultimately go to trial on one issue only, and much attention was given, and many rules made and enforced, to secure this result. These rules are given as lucidly as possible by Mr. Stephens in his work on Pleading, from which the following extracts are taken:

"The following is an instance of duplicity in a plea in bar: In trespass for breaking a close, and depasturing the herbage with cattle, if the defendant pleads that A had a right of common, and B also a right of common in the close, and that the defendant as their servant, and by their command, entered and turned in the cattle in exercise of their rights of common, the plea is bad for duplicity; because the title of either one or other of the commoners, and the authority derived as his servant, would have alone constituted a sufficient answer to the declaration. Duplicity in the replication may be thus exemplified: The plaintiff declared in trespass for breaking and entering his stable, cutting asunder a beam, and throwing down the tiles of the roof. The defendant justified, as servant of Sir H. G.; and pleaded that Sir H. G. was seized of a wall in his demesne as of fee, and because the beam was placed in the wall of the said Sir H. G. without his consent, the defendant, as his servant, in order to remove this nuisance, did enter

¹⁰⁶ *Nunn v. Townes*, 23 S. W., 1117; *Shiner v. Abbey*, 77 Texas, 1, 13 S. W., 613; *Krohn v. Heyn*, 77 Texas, 319, 14 S. W., 130; *Reese v. Medlock*, 27 Texas, 120.

¹⁰⁷ *Stewart v. Gordon*, 65 Texas, 344.

¹⁰⁸ 9 Texas, 410.

the stable and cut the beam as near to the wall as he could, doing as little damage as possible; and thereby the tiles were thrown down. The plaintiff replied, traversing that the wall was Sir H. G.'s; and then, with a protestation that the wall was not his, farther pleaded that the defendant, of his own wrong, did throw down the tiles from the cutting the beam as aforesaid. The court held that the first traverse being a complete answer to the whole, the second made the replication double."

"Singleness Relates to a Single Claim.—The object of this rule being to enforce a single issue upon a single *subject of claim* admitting of several issues, where the claims are *distinct*, the rule is, accordingly, carried no farther than this in its application. The *declaration*, therefore, may in support of *several demands*, allege as many distinct matters as are respectively applicable to each. Thus, let one of the examples above given, with respect to the declaration, be so far varied as to substitute for the case of an action in debt on a penal bill for the penalty accrued in consequence of nonpayment of a sum by several installments, the case of an action of covenant to pay that sum by similar installments. In this latter case the plaintiff might, without duplicity, declare that the defendant 'did not pay the said total sum, or any part thereof, upon the several days aforesaid.' For he does not, as in the action upon the penal bill, found upon such nonpayment a single claim, viz., the claim to the penalty of seven pounds; there being no penalty in question his claims are multiplied in proportion to the number of nonpayments; that is, he is entitled to ten shillings in respect to the first default, and ten shillings more upon each of the rest. The allegation of several defaults is therefore, in this case, the allegation of so many distinct demands, and consequently allowable. So the *plea* though it must not contain several answers to the whole of the declaration, may nevertheless make distinct answers to such parts of it as relate to different matters of claim or complaint. Thus, in the preceding example of duplicity in a plea in bar, if the claim were a little varied, and the defendant, being charged with putting five beasts on the common, had pleaded that A and B had respectively rights of common there, and that he, as the servant of A, put in two of the beasts in respect of *his* common right, and as the servant of B put in three in respect of *his* common right, there would no longer be duplicity; for he pleads the several titles, not as several answers to the same subject of claim or complaint, but as distinct answers to different matters of complaint arising in respect of different cattle. So in the *replication*, and other subsequent, a severance of pleading may take place in respect of several subjects of claim or complaint. Thus, if an action be brought for trespass in closes of A and B, and defendant pleads a single matter of defense applying to both closes, the plaintiff is still at liberty, in his replication, to give one answer to so much of the plea as applies to close B.

“The power, however, of alleging in a plea distinct matters in answer to such parts of the declaration as relate to different claims, seems to be subject to this restriction; that neither of the matters so alleged be such as would alone be sufficient answer to the whole. Thus, if an action be brought on two bonds, though the defendant may plead, as to one, payment, and as to the other, duress, yet if he pleads as to one a release *of all actions*, and as to the other, duress, it will be double, for the release is alone sufficient answer to both bonds.”

This rule has no place in our law. The plaintiff is permitted to state as many rights in the same thing and as many violations of the same right or of different rights in the same thing as he sees fit, and the defendant may plead as many defenses to the plaintiff's cause of action as he may have, and no objection can be urged against either of them.

MULTIFARIOUSNESS.

Mr. Anderson defines multifariousness as follows:

“Multifariousness. (*L. multus*, many; *fari*, to speak; claiming various things.) Blending in one bill in equity matters which in their nature are distinct and independent.

“Improperly joining in one bill distinct and independent matters, and thereby confounding them. (Story Eq. Pl., secs. 271, 530; 104 U. S., 251; 98 Id., 604.)

“Embracing in the same bill distinct matters, which do not affect all the defendants alike. (*Payne v. Hook*, 7 Wall., 433 [1868], Davis, J.)

“A bill is subject to this defect, if one of two complainants has no standing in court, if they set up antagonistic causes of action, or the relief for which they respectively pray involves totally different questions, requiring different evidence and leading to different decrees. (*Walker v. Powers*, 104 U. S., 245, 250 [1881], cases, Miller, J.; *Daniel Ch. Pr.*, 336.)

“But charging different *sources* of right does not introduce the vice. (*Welford*, Eq. Pl., 93; *Cumberland Valley R. Co.'s Appeal*, 62 Pa., 227-8 [1869].)

“It is impracticable to lay down any rule as to what constitutes multifariousness, as an abstract proposition. Each case must depend upon its own circumstances, and be left necessarily, to the sound discretion of the court. It can not be objected to, as of right, except by demurrer, plea, or answer; and not at all, at so late a period as the hearing, or in the appellate court. But it may be taken by the court *sua sponte*, when necessary to the administration of justice. (*Oliver v. Platt*, 3 How., 412, 411 [1845], cases, Story, J.; Story, Eq. Pl., sec.

747; *Barney v. Latham*, 103 U. S., 215 [1880]; *Hill v. Hill*, 79 Va., 592 [1884].)

"As a rule the court will not subject parties to the expense, vexation, and delay of several suits, where the transactions constituting the subject of the litigation, or out of which the litigation arises, are so connected by their circumstances as to render it proper and convenient that they should be examined in the same suit, and full relief given by one comprehensive decree. (*Sheldon v. Keokuk Packet Co.*, 10 Biss., 473 [1881], *Harlan, J.*; 8 F. R. 770; *United States v. United Pacific R. Co.*, 98 U. S., 604 [1878]; *De Wolf v. Sprague Mfg. Co.*, 49 Conn., 292-93, 302 [1881]; *Mining Debris Case*, 8 Saw., 628, 636 [1883]; 16 F. R. 32; 8 Id. 378, 703; 18 Blatch, 420; 19 Id. 531; 30 Conn., 323; 68 Ga., 60; 14 Ill., 25; 2 Gray, 467; 9 Mich., 71; 32 N. H., 25; 58 Id., 421; 66 Barb., 12; 13 T. L., 413.)

"A different rule would often prove oppressive and mischievous, and result in no benefit to a litigant whose objection was not simply to harass his adversary, but to ascertain his legal rights. (*Potts v. Hahn*, 32 F. R., 662 [1887].)"

The Texas cases and rules on the subject of proper and improper joinder of causes of action have been given in the preceding chapter on "Joinder and Misjoinder of Causes of Action," and need not be repeated.

Multifariousness is the combination in one pleading of two or more inconsistent and repugnant causes of action or grounds of defense which, under the law, should not be plead together.

Duplicity is the double or multiform statement in same pleading of one cause of action or defense.

The two should not be confounded, for the former, multifariousness, is always a defect, and the latter is always permissible under our system.

As stated in the former chapter, the rules in the Texas system are much nearer the equity practice than the common law, though they may be even more liberal than in equity. Each case must be determined by its own facts upon the general principles before stated.

RULES AS TO VERIFICATION OF PLEADING.

To verify a pleading is to state in writing, signed by the affiant, and under the sanction of an oath, taken before some competent officer, that the matters of fact in the pleading are true. This statement is usually attached to the pleading and must in all cases clearly identify it or such portions of it as the affidavit applies to. The verification may extend to the contents of the whole instrument or only portions, and

in each instance in should clearly indicate just what part of the pleading, whether all or less, is sworn to.

There is no general rule or practice in Texas requiring verification of all pleadings. There are numerous statutory provisions on the subject as to particular pleadings.

Almost all instances in which the plaintiff is required to verify his pleadings are cases in which he seeks some interlocutory order, or mesne process interfering with the defendant's use or enjoyment of something or right pending the litigation; such as the issuance of a writ of injunction, *mandamus*, attachment, or sequestration, etc.

There are a few instances in which verification is required not coming under this principle, as proceedings by *quo warranto*, in which the public interest in the subject matter is supposed to be so great that some guaranty of good faith is usually demanded before the suit can be instituted; or suits on accounts in which the affidavit does not affect the sufficiency of the pleading or any action to be taken before trial, but relieves the plaintiff from introducing evidence to support his case unless met by a counter-affidavit by the defendant, denying the justness of the claim.

The requirements as to verification by the defendant are based on the considerations above stated and some others. The cases coming under the principles above discussed are those in which the plaintiff has by some sworn pleading procured an order which the defendant wishes to set aside. The law requires the reply of the defendant to be sworn to in order to meet the presumption of right arising upon the sworn pleading of the plaintiff. Those based on other reasons relate to the final trial of the case. They affect principally the burden of proof and admissibility of testimony. There are certain facts which if properly plead by the plaintiff can only be put in issue by the defendant by verified answer. This is true of nearly all the defensive matters enumerated in the statute as necessary to be verified. The only exception firmly established by the decisions is in pleading failure of consideration of written contracts, regarding which it has been held that if a plea otherwise good is interposed, the absence of verification must be taken advantage of by special exception or else it is waived, and testimony may be heard and considered under it. The distinction made in the decisions is: that if the defense set up is one, as to which the burden of proof under the general common law rules of evidence and practice is upon the defendant, and if it remains on him after the sworn plea is filed under the statute, the effect of the requirement only goes to the good faith of the defense, hence the plaintiff may waive the protection against fictitious defenses provided by the statute, and failure to object to the pleading in the manner pointed out by law for making formal objections, is such waiver; but where, under the general rules of practice,

the burden of proof is on the defendant, and verification under the statute throws this burden upon the plaintiff, the defendant is not permitted to do this, except in strict compliance with the statute. The distinction does not seem very great, and that it was ever drawn is to be regretted. The practice should be uniform, and failure to except to the answer for want of verification ought to be either a waiver of the objection to the pleading in all cases or not such waiver in any.¹⁰⁹

A pleading does not become evidence by being sworn to; the presence or absence of verification may affect its sufficiency to raise issues of designated kinds, but the admissibility of a pleading in evidence is not affected by its verification.

This subject will be considered more fully in connection with those pleadings which are required to be sworn to.

Pleas in Abatement Must be Verified.

The statutes of Texas early provided: "That no plea in abatement, except a plea to the jurisdiction of the court, or when the truth of the plea appears of record, shall be received or admitted unless the party pleading same, or some other person for him shall make affidavit to the truth thereof."¹¹⁰

This was continued in the statutes until the revision of 1879. It was omitted from that revision and a number of dilatory pleas were enumerated therein, which were required to be verified, but no general requirement as to all such pleas was made. This is the present condition of the statute.¹¹¹

RULES AS TO CONCISENESS.

The rule on this subject is stated by common law authorities in the formula, "Surplusage is to be avoided." It is a most salutary rule and should be most carefully observed. In it are condensed and expressed many of the doctrines which have been previously stated. The rule re-

¹⁰⁹ *Williams v. Bailes*, 9 Texas, 62; *May v. Pollard*, 28 Texas, 677; *Drew v. Harrison*, 12 Texas, 279; *Kelley v. Kelley*, 12 Texas, 452; *Persons v. Frost & Co.*, 25 Texas Supp., 130; *Sessums v. Henry*, 38 Texas, 37; *I. & G. N. R. R. Co. v. Tisdale*, 74 Texas, 8.

¹¹⁰ District Court Practice, act 1840, sec. 31.

¹¹¹ Hartley's Digest, art. 690; Rev. Stats. 1879, art. 1265; Rev. Stats. 1895, art. 1265. Cases under old statute: *Dallam*, 591 and 608; *Cook v. Thornhill*, 13 Texas, 297; *Wilson v. Adams*, 15 Texas, 324; *Whitenberg v. Newton*, 31 Texas, 475; *Allen v. Pannel*, 51 Texas, 169; *Taylor v. Hall*, 20 Texas, 215; *Higgins v. Frederick*, 32 Texas, 283; *Bishop v. Honey*, 34 Texas, 245. Under the new: *Graham v. McCarthy*, 69 Texas, 323; *Jones v. Austin*, 6 Texas Civ. App., 505, 26

quiring that the facts should be fully stated gives the affirmative view of the subject of pleading, and is a rule of inclusion; the rule requiring conciseness gives the negative view, and is a rule of exclusion. It is a violation of this rule to include anything in a pleading which is not stated for some definite legal purpose. By it the statement of abstract legal propositions, facts judicially known, facts and conditions which are so common in their nature as to be legally presumed, matters more properly coming from the other side, evidence, and all irrelevant matters, are excluded.

It not only forbids the statement of all irrelevant and unnecessary matters, but applies with equal force to the manner of stating facts, proper to be alleged, and demands the selection of the clearest and most apt terms and the use of the fewest words consistent with certainty. Some pleaders seem to imagine that by useless repetition and long, meaningless statements they give great strength and legal form to their productions. Just the reverse is true, and every pleading filed should be a model of concise, terse, and accurate expression.

In the great majority of cases, surplusage is rather a hindrance and an embarrassment than a fatal defect. The courts usually reject it and suffer the party to recover upon the facts of his case notwithstanding the bad form of his pleadings. In cases in which the errors are too gross, the court sometimes requires a replader and taxes the costs against the offending party.

The law writers mention another danger, although illustrations of it are extremely rare. That is, stating the case with too great particularity, and so combining the surplusage with the essential facts that they can not be separated; from which it sometimes results the pleader finds himself compelled to prove more than would otherwise have been essential, and so incurs the danger of failure of proof and also of variance.

PLEADINGS MUST BE LOGICAL.

One of the two adjectives used in the statute regarding pleading is "logical." One of the definitions given by Mr. Webster of logic is: "The science of generalization, judgment, classification, reasoning, and systematic arrangement." A logical statement of facts therefore would be a statement in which the facts had been properly reasoned on, judged, and classified, and then set out in systematic order and arrangement.

All good pleading consists of such statements. Before attempting to prepare any pleading, the attorney should thoroughly familiarize him-

self with the facts of his case, consider them in every aspect, and fully appreciate their legal significance, and adopt some rational basis for the systematic presentation of them. The grouping of the facts should be made to depend either upon their natural or legal relation one to the other, or both, and they should be stated with such continuity of thought and reference one to the other that the mind of the judge and of the adverse party and of the jurors can readily grasp the controlling points in the case and understand readily the issues presented.

In the rules for the government of district and county courts, the Supreme Court says: "Facts are adequately represented by terms and modes of expression wrought out by long judicial experience, perpetuated in books of forms, in law and equity, which, though not authoritatively requisite, may generally be adopted as safe guides in pleading."

These established modes of legally expressing facts are valuable in cases in which they are appropriate. The pleader must, however, exercise wise discretion, and adopt and use only such of them as really represent and express the facts of his case, for it is these facts, and these only, that ought to be presented in every suit in Texas.

FAILURE TO OBSERVE THE RULES OF PLEADINGS.

The different rules of pleading are entitled to different degrees of importance. Some are imperative, and some merely directory; and the results of the violation of the same rule will be different according to the manner and time at which such violation is called to the attention of the court.

Defects in Substance.

The most important of these rules is the one requiring that a pleading shall state fully the facts relied on. A violation of this rule is fatal when called to the attention of the court, no matter at what stage of the proceedings, unless there be something in the record, proper to be considered in connection with the pleading, which will supply the omission. By "the record" here is meant all matters properly presented to the court before or at the time the judgment of the court is asked as to the sufficiency of the pleading. If the plaintiff's petition be bad, because of the omission of some essential fact, and the defendant reply to it by demurrer and denial only, the defect must be fatal, whether urged by the defendant upon his demurrer, or upon a motion for rehearing or arrest of judgment, because nothing has come into the record which can be considered in connection with the petition as supplying the

omission. When the point is urged after verdict, however, the distinction must be kept in mind between an imperfect and too general statement of a material fact, and the entire omission of such fact from the pleading, for the imperfect or too general allegation will be cured by verdict, provided proof of such fact would be essential to sustain the finding, but even a verdict can not supply the entire absence of a material averment.

If, in his answer to such defective petition, the defendant go beyond the negative pleading and suggest new matter, and in this new matter should aver the fact that was omitted from the petition, the authorities are not uniform as to the effect of such allegation upon the defendant's demurrer. The case of *Day Cattle Company v. State*,¹¹² seems to teach that if the matter stated in the answer is consistent with the averments of the petition, the whole answer can be considered upon the demurrer and the petition will be aided by the answer. It should be borne in mind that the exact point regarding which the statement was made is a peculiar one. The defendant was insisting on a demurrer because the plaintiff's petition showed that the claim set up was void and could not be an injury to the plaintiff's right, and the court answers it by urging that at the time the court passed on the demurrer, the defendant in other portions of the answer was asserting this void title as a basis of relief. On principle the propriety of this statement as a general rule, would seem quite doubtful; for as the statute requires that all matter of defense shall be presented at the same time and in due order, and as the rules of pleading and practice require that these several defenses also be presented for action in due order, it seems illogical in hearing a demurrer to look beyond it to the matters of fact averred in the answer which are not then before the court.

It has been held that if the allegation in the answer which the plaintiff sought to incorporate into his petition, in considering the demurrers, was inconsistent with the averments of the petition, such consideration would be a contradiction of the petition rather than curing the omission in it, and that under such circumstances the petition could receive no aid from the answer and the demurrer should be sustained.

If the omission in the petition is not pointed out by demurrer, or if pointed out, the demurrer is waived and the parties go to trial upon the merits, and all the pleadings are read and the objection is urged against the admission of testimony offered by the plaintiff, that he has no sufficient averments in his petition, it seems both legal and logical that the court should look to the entire record, and, if the matter omitted by the plaintiff was supplied by the defendant's answer, that this would destroy the objection to the testimony; for while it is true that the plaintiff must recover upon the case which he has sued on, and will

¹¹² 68 Texas, 526, 4 S. W., 865.

not be permitted to allege one cause of action and recover upon another, nor to contradict his pleading by his proof, still, if the objection be not one of contradiction of his pleadings, but of absence of averment in the petition, it might well be that the defendant would be estopped from pleading surprise at proof of a fact he had himself averred, or lack of preparation, to sustain a theory of the case presented by his own pleadings. The case would be even stronger if the testimony was received without objection and verdict had been returned and the point was made for the first time on motion for new trial or in arrest of judgment in the trial court, or by assignment of error.

Defects in Form.

Violations of the other rules relate to matters of form, for if the petition have in it an intelligent statement of every fact essential to the cause of action or ground of defense, it would be good against a general demurrer, no matter how informal or objectionable the manner of its statement. Objections to form must be urged by special demurrer, and must be called to the attention of the court at the proper time; which is after all pleas in abatement have been disposed of, and before the announcement of ready on the facts of the case, and according to rules at the first term of the court after filing, if there be time, though this is not often insisted on. When this is done, the particular objection urged will be considered by the court, and if well taken, the pleading will be held bad, and unless amended, so much of it as is subject to the objection will be stricken out. If this should be some essential part, and no leave of the court to amend were asked, judgment would be rendered against the plaintiff. If it were not essential, and a good cause of action were still alleged, notwithstanding the informal statement of some particular matter, the case would proceed to trial upon the matters well plead. Upon sustaining the demurrer the party would, of course, have the right to take leave to amend and cure the defects, if he so desired.

If no special demurrer is urged against these formal defects, or if objection is waived either expressly or by failure to call to the attention of the court at the proper time, the right to urge such defect is lost, and no advantage of it can be taken thereafter. To prevent a misconception of this statement, it may be well to say that the decisions hold that the affidavit to a plea of failure of consideration to a written instrument sued on is regarded as a matter of form and may be waived; but that affidavit to all other answers to the merits required by the statutes to be sworn to though not to pleas in abatement, are construed as matters of substance, and are not waived by failure to call them to the attention of the court by demurrer.

PLEADINGS BY INTERVENORS.

Every intervenor, as has been seen in the preceding chapter on "Parties," when he comes into a case, must do so because he has some right in the subject matter of the suit or the thing to be effected. This right must be of such nature and so connected with the suit as to entitle him to obtain some remedy in that litigation or prevent the recovery of some remedy sought therein by one or more of the other parties. In other words, he must be either an actor seeking relief or a *reus* resisting relief sought by some one else; that is, he must, in legal effect be either a plaintiff or defendant in the action. The nature of the case and his rights determine his position. Whatever be his position he must govern himself by the rules of pleading applicable thereto. So far as he seeks relief he must conform to the rules governing the pleadings of a plaintiff; so far as he resists some relief sought by another he must conform to the rules governing defendants. It is therefore unnecessary to discuss these rules with special reference to this class of parties. All that is required is the intelligent application of the rules of pleading as to regular parties.

CHAPTER XII.

DIFFERENT INSTRUMENTS OF PLEADING AND THEIR RELATIONS TO EACH OTHER.

In the Texas law regarding pleading, the terms *petition* and *answer* are used in a generic sense; the former indicating the aggregate of all the pleadings by the plaintiff, and the latter the aggregate of all the pleadings by the defendant. Neither party is limited to any specified number of instruments he may file in the case, but may file any number, which the exigencies of the case may require; however, in fact the pleadings very rarely extend beyond two instruments on each side, though there is no arbitrary rule limiting the number.

Each of the pleadings by the plaintiff bears the generic designation "petition," preceded by one or more adjectives indicating its particular nature and place in the process of pleading. In like manner each of the pleadings by the defendant bears the generic designation "answer," preceded by appropriate adjective or adjectives specifically describing its nature and position in the case.

Each pleading by the respective parties filed after the plaintiff's original petition is a reply to the last preceding pleading filed by the adverse party, and each should be prepared with special reference to this fact, and be confined to matters responsive to such pleading. Matter properly belonging in one class of pleading should not be included in a pleading of a different class.

The order of filing these several instruments is as follows: The first is the plaintiff's original petition. This should embrace every fact essential to the plaintiff's *prima facie* cause of action, an appropriate prayer for relief, and the several formal matters required by statute. The plaintiff can not properly file a pleading of any other class until the defendant answers. If he desires to change the original petition in any way he may do so by an amendment, but the amendment would still be of the same class as the original whose place it took. The first pleading filed by the defendant is the defendant's original answer. This may set out as many different matters of law and fact, whether pleas in abatement or in bar, as may be necessary to meet the case as made by the plaintiff's original petition, and may also contain new matter in the nature of a cross-action or reconvention. All of these matters are embraced in the one instrument designated as above. This original answer of defendant constitutes the second pleading in the case. It relates to, and is intended to controvert, the plaintiff's original

petition. If the defenses interposed in the original answer are negative, consisting only of demurrers and denials, and embodying no new matter, the pleadings close with it, as there is nothing for the plaintiff to reply to. If, however, the answer goes further and sets up new facts, either by way of defense or as a basis for affirmative relief, as in cross-action or reconvention, the plaintiff has the privilege of replying to such new matter. This he does in the plaintiff's first supplemental petition. This is the second class of pleading by the plaintiff. It is the third pleading in the case, and the first pleading designated as a supplement. Its purpose is to reply to the defendant's original answer. It may join issue with the new matter in such answer by demurrer or by denials, and may also set up new matter, either in confession and avoidance of the new matter contained in the defendant's original answer, or may contain additional facts responsive to such new matter, which would entitle the plaintiff to affirmative relief. If it contains no new matter, the pleadings close here. If it does contain new matter, then the defendant may reply to it by a pleading designated defendant's first supplemental answer. The sole purpose of this pleading is to reply to the plaintiff's first supplemental petition. If this first supplemental answer contains new matter, the plaintiff may reply to it by a pleading styled plaintiff's second supplemental petition, and if this contains new matter, the defendant may reply to it by a pleading designated defendant's second supplemental answer. This process may continue as long as there is new matter set up by either party. There is no change of name for these remaining pleadings except in the numerals indicating them as plaintiff's third supplemental petition, fourth supplemental petition, etc., and defendant's third supplemental answer, defendant's fourth supplemental answer, and so on indefinitely.

The relative position and relations of these pleadings may be better understood by an examination of the following diagram:

GENERIC DESIGNATION—ANSWER.

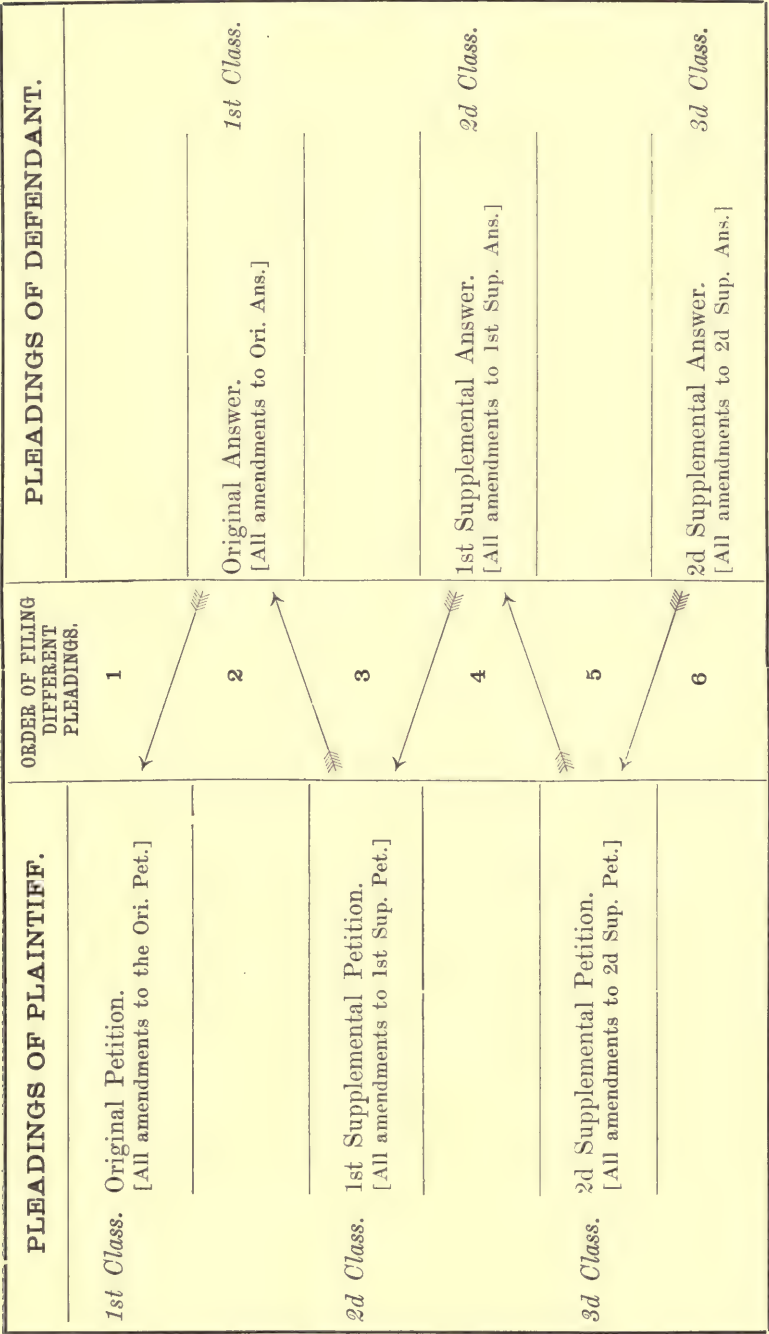


DIAGRAM SHOWING ORDER OF PLEADING.

It must always be borne in mind that each of these several instruments has its own place in the process of pleading, and stands in a class to itself, and that no one can be properly made to fill the place of another. To illustrate: The plaintiff files his original petition and the defendant answers by demurrer, and also sets up new facts. If the plaintiff upon examination of the question concludes that the demurrers are well taken, he should not undertake to avoid their effect by filing a first supplemental petition setting out facts which were omitted in his original petition, because the supplemental petition comes later in the order of pleading than the original answer and its purpose is to reply to the facts set up in the answer and to join issue upon them, and the defendant's answer could not be used to join issue on it. The plaintiff's remedy in such case would be to take leave to file an amended original petition and include in it the omitted facts. This would give him a complete instrument of the first class in order of the pleadings containing his entire *prima facie* cause of action, and the defendant's answer would then reply to it. The ground of demurrer previously urged would, of course, be gone, but other defenses of the defendant would still obtain. If, however, instead of amending the original petition the plaintiff undertook to cure its defects by alleging the omitted matter in a supplemental petition, the court could not properly consider such matter in connection with the original petition, and would sustain the demurrer to such original petition. Besides this, the matter which should have been in the amended original petition would be out of place in the first supplemental petition, and would give good cause to the defendant to demur to it in his first supplemental answer.

It may be stated as an invariable rule that defects in a pleading of any class should be cured by an amended pleading of that class, and not by a pleading of some subsequent class.

Leave of the court must be gotten to file each pleading coming after the defendant's original answer. This will be given as a matter of right at any time before the parties announce ready for trial on the merits, and may in the discretion of the court be permitted even after such announcement.

AMENDMENTS.

The office of an amendment is to cure some defect in a pleading already filed. It does not add any new class. Every pleading in each class may be amended by leave of the court. The first amendment to the original petition is designated as plaintiff's amended original petition; when amended the second time it is known as plaintiff's second amended original petition, and so on, each amendment taking its ap-

propriate number. The first amendment of the defendant's original answer is designated defendant's amended original answer, and the second as defendant's second amended original answer, as with the petition. It seems a little inapt to speak of an instrument as an amended original, but the term original here is used in contradistinction to supplemental, to indicate that the pleading to which it is applied belongs to the first class of pleading filed by the plaintiff or the defendant, as the case may be. The first supplemental petition is amended by filing plaintiff's amended first supplemental petition; it is amended the second time by filing plaintiff's second amended first supplemental petition. The words plaintiff and petition here indicate by what party the instrument is filed. Its designation as first supplemental indicates the class of the pleading; and the words second amended indicate that it is the third instrument of that class filed by the plaintiff in the case. If it is the second supplemental petition that is amended, the designation is plaintiff's amended second supplemental petition. Here the words plaintiff and petition indicate by whom the pleading is filed, and second supplemental shows the class of the pleading, and amended shows that this is the second pleading of that class. Thus it is seen each of these terms has its appropriate significance. The second amended first supplemental petition indicates a different pleading, belonging to a different class, and filed at a different stage of the case from the amended second supplemental petition. And so with each designation. The same rules apply with reference to the defensive pleadings and need not be repeated. Each amendment of a pleading becomes a substitute for that pleading, and after its filing the pleading which it amends is no longer considered as part of the record, except in a few instances in which some point is made as to a ruling of the court upon it, in which case it is retained as part of the record for the purpose of having the ruling revised on appeal or writ of error. The amendment should refer to and identify the pleading for which it is substituted, and should be complete in itself, containing every matter which should be in a pleading of that class by that party in that case. This is the rule in all cases except trial amendments, for which special provision is made, as follows: If in the progress of the trial of a case a demurrer to any pleading is sustained, and there is no opportunity to rewrite the whole pleading, the court can permit the party to prepare an instrument known as a trial amendment, to be used in connection with the pleading amended, supplying its omissions as adjudged upon the demurrers of the adverse party. This is only permitted if the trial proceeds at that time; and if the case is postponed for any reason the court should require the matters embraced in the former pleading and in the trial amendment to be incorporated in one pleading.

Amendments can be made only upon leave of the court, and the tak-

ing of such leave during term time, after both parties are before the court, is regarded as sufficient notice of the filing of the amendment. Ordinarily, the leave must precede the filing, but under a recent statute allowing amendments in vacation, when no leave of the court can be obtained, the instrument may be prepared and filed and notice given to the adverse party and formal leave of the court for the substitution of the amendment for the former pleading, can be had at the opening of the next term of the court, but the date of the amendment for the purpose of notice, etc., will be counted from the time that the adverse party was advised of its filing.

Amendments Setting Up New Cause of Action.

A number of nice questions have arisen as to what may be set up in amended pleadings. That is, how far can the pleader depart from the matter stated in the former pleading and still present the same cause of action or ground of defense; and if the matters set out in the amendment should be regarded as a new cause of action or ground of defense, what is the effect of this upon the rights of the parties?

The answer to these questions is often difficult, and the cases are out of harmony with one another, and some of them, it seems, contrary to principle.

There are three propositions which may be regarded as settled.

First. A party has the legal right to amend his pleading at any time before announcing ready for trial on the facts, upon getting leave of the court. This is true, without reference to the kind of suit.¹

In some instances he may do so after such announcement.

See cases in second succeeding note.

Second. He may make any alterations in his pleading by amendment which he desires, but must take the legal consequences resulting therefrom.²

Third. The results of the amendment upon his case will depend on the nature of the amendment and the time it is made.

We will consider these propositions in their order. As to the first, the statute says:

"Art. 1188. All parties to a suit may in vacation amend their pleadings, may file suggestions of death and make representative parties, and make new parties, and file such other pleas with the clerk of the

¹ Cleveland v. Tufts, 69 Texas, 580, 7 S. W., 72; Connell v. Chandler, 11 Texas, 249; Leas v. McDonald, 13 Texas, 349; Dewitt v. Jones, 17 Texas, 620; Shelton v. Berry, 19 Texas, 154; Hatchett v. Conner, 30 Texas, 104; Boren v. Billington, 82 Texas, 138, 18 S. W., 101; Railway Co. v. Butler, 34 S. W., 756.

² Beal v. Alexander, 6 Texas, 531; Williams v. Randon, 10 Texas, 74; Hopkins v. Wright, 17 Texas, 30; McLane v. Belvin, 47 Texas, 502; Weibush v. Taylor, 64 Texas, 53; Woods v. Huffman, 64 Texas, 98; Howard v. Windom, 86 Texas, 560, 26 S. W., 483.

court in which suit is pending as they may desire. Any party may in vacation intervene in any suit pending such amendments and pleas, subject to be stricken out at the next term of the court on motion of the opposite party to the suit for sufficient cause shown or existing, to be determined by the court; provided, that it shall be the duty of the party filing such pleading to notify the opposite party or their attorneys of the filing of such papers within five days from the filing of the same. All amendments to pleadings, pleas, and pleas of intervention, must, when court is in session, be filed under leave of the court, upon such terms as the court may prescribe, before the parties announce ready for trial, and not thereafter."

The latter part of this statute would seem to be mandatory. It has not been so construed; on the contrary, there are many cases in which, after the jury had been impaneled, and while the evidence was being heard, amendments have been permitted, to avoid objections to testimony on the ground of variance.³

From these cases it appears that the right to amend is cut off by the announcement of ready on the merits, but that the privilege is not, and in cases where the ends of justice will be subserved by so doing, the court can still permit it under such terms as to costs, continuances by adverse party, etc., as may be deemed just.

The second proposition only announces that the party making the amendment must bear the legal consequences, whatever they may be.

As to the third, the results of amendments, there is not that harmony among the cases that is desirable on a matter of practice so important, and of such frequent occurrence.

For purposes of determining their results, amendments may be divided into five classes which, retaining the usual phraseology, are: (1) Those which do not change the cause of action or ground of defense, and set up no additional rights. (2) Those which leave the original cause of action or ground of defense unchanged, and set out one or more additional ones pertinent to **that** formerly alleged and so connected with it that they might properly have been combined with it in the former pleading. (3) Those in which the original cause of action or ground of defense is left unchanged, and which set up one or more additional matters independent thereof, and so distinct therefrom that they could not properly have been combined in the former pleading. (4) Those which abandon the original cause of action or ground of

³ *Whitehead v. Foley*, 28 Texas, 10; *Hays v. Railway Co.*, 46 Texas, 273; *Parker v. Spencer*, 61 Texas, 155; *Railway Co. v. Goldberg*, 68 Texas, 685, 5 S. W., 824; *Behan v. Ghio*, 75 Texas, 88, 12 S. W., 996; *Radam v. Cap. M. D. Co.*, 81 Texas, 122, 16 S. W., 990; *Tel. Co. v. Bowen*, 84 Texas, 477, 19 S. W., 554. Cases in which privilege was denied: *Heflin v. Burns*, 70 Texas, 352, 8 S. W., 48; *Harris v. Spence*, 70 Texas, 619, 8 S. W., 313; *Petty v. Lange*, 81 Texas, 238, 16 S. W., 999; *Batts' Annotated Civ. Stats.*, notes 3874 through 3972.

defense, and substitute therefor one or more others so connected with the former that they might have been properly combined in the former pleading. (5) Those which abandon the original cause of action or ground of defense, and substitute therefor one or more others so disconnected from it that they could not have been properly combined with it in the former pleading. In cases falling clearly within any one of these classes there is no difficulty.

As to cases falling in the first class, as we have seen, a party may improve the manner of stating his case and amplify its facts, and make a more detailed and intelligent presentation of it, subject, of course, to the same limitations as to detailing his evidence that obtain in the presentation of the original pleading. No one can be injured by this, and the practice should be encouraged in all cases in which the original pleadings are not in best form.

Regarding cases in the second class, there is no difficulty in making the amendment even though it set up matters arising or rights occurring since the filing of the former pleading,⁴ but as to the additional causes of action the amendment is the beginning of a new suit, and all defensive matters as to these new causes of action can be availed of just as if the suit were brought at the time of filing the amendment. That is, if there is any matter in abatement of these additional causes it may be plead and will not be out of its due order. Limitation runs against each of such additional causes of action up to the time it is plead, and so through the whole range of defenses.⁵

In such cases, however, the original cause of action is not affected by the amendment, and as to that the plaintiff's rights are just as before the amendment was filed.

In cases in the third class somewhat different rules obtain. Here, as in the second, the filing of the amendment is the beginning of the suit as to the new matters set up, and the defendant may make all his defenses as to them as in the second class; but as these and the original causes are not legally connected and are improperly joined, the defendant can plead in abatement this misjoinder and compel the plaintiff to elect between the original and the new. If he elects to retain the original suit, the new causes of action will be stricken out at his cost as to the amendment. If he elects to retain the new causes of action, the original will be stricken out, and all the costs up to the filing of the amendment may be taxed against him, and the case will proceed as if originally brought at the time of filing the amendment.

In the fourth class, the plaintiff has made his election in advance

⁴ *Smith v. McGaughey*, 13 Texas, 466.

⁵ *Speake v. Prewitt*, 6 Texas, 252; *Irvine v. Bastrop*, 32 Texas, 485; *Woods v. Huffman*, 64 Texas, 98; *E. L. & R. R. Ry. Co. v. Scott*, 75 Texas, 84, 12 S. W., 995; *Howard v. Windom*, 86 Texas, 560, 26 S. W., 483.

and abandoned his original suit. He will, in the discretion of the court, be made to pay the costs up to the time of the filing of the amendment, and the suit will proceed on the amendment just as a new suit.

In the fifth class the rules are the same as in the fourth class, except that the costs will always be taxed against the plaintiff.

Difficulty arises whenever the matters in the amendment are different from the former pleading but are closely connected with them. Do they then present the same cause of action or a different one, and if the latter, in which of the last four classes does the amendment fall? It is apparent that these questions can not be answered intelligently until we understand what is meant by cause of action in this connection. In the older cases, the phrase was given a strict construction with the same import that it has in other rules of pleadings. Whether the amendment presented the same or a different cause of action or ground of defense from that set up in the original was made to depend on the legal effect of the facts alleged. If the legal effect was the same, they were held to be identical, but if there was any material difference in the legal effect of the facts, or if they brought into operation different rules of law, they were held to be different. The test most frequently applied was whether the two were so closely connected that the same evidence would maintain both pleadings, or, more properly, the suit in both forms, if so they were held to be identical, if not, they were regarded as different. This is the test applied in all the cases until very recently.⁶

This is certainly a satisfactory test, whenever an affirmative answer may be given, for if the evidence will sustain both pleadings, there can be no controversy that the issues presented by the two are the same. This test has been applied even when the pleader had himself been mistaken as to the legal effect of the facts, so greatly as to designate his suit as one on contract when it was on tort, or has called it a suit on tort when it was on contract. If he set out his facts in each instance and they are the same, the incorrect conclusion of law announced by the pleader could not change the legal import of his facts.⁷

But is the test equally reliable in cases in which the evidence admissible under the one pleading will not sustain the suit as set out in

⁶ Amendments setting up new cause of action: *Morrison v. Walker*, 22 Texas, 18; *Ersline v. Wilson*, 27 Texas, 118; *McRee v. Brown*, 45 Texas, 503; *Holcomb v. Kelly*, 57 Texas, 618; *Railway Co. v. Scott*, 75 Texas, 84, 12 S. W., 995; *Railway Co. v. Pape*, 73 Texas, 501, 11 S. W., 526. Amendments not setting up new causes of action: *Railway Co. v. Buckalew*, 3 Texas Civ. App., 272, 34 S. W., 165; *Railway Co. v. Spellman*, 34 S. W., 298; *Railway Co. v. Wellington*, 36 S. W., 1114; *Cotter v. Parks*, 80 Texas, 539, 16 S. W., 307; *Landa v. Obert*, 78 Texas, 46, 14 S. W., 297.

⁷ *Railway Co. v. Richards*, 11 Texas Civ. App., 95, 32 S. W., 96.

the other. Is this always to be conclusive of the point that the causes of action are different? In strict principle, it would seem to be so, but the latter cases do not so hold. The judges have not changed the wording of the rule, but have allowed themselves great latitude in applying it and in construing the pleadings and determining what the cause of action set out in each is, and have, by this process, avoided the real effect and value of the test. In principle, a cause of action is the plaintiff's right, the wrongful acts or omissions by the defendant in violation of that right and the injury to the plaintiff consequent thereon. Each of these elements is essential to the cause of action, and, strictly speaking, no two causes of action can be identical in which either of these elements is different. If the rights differ, the causes of action differ; if the wrongs differ, the causes of action differ; and if the injuries differ, the causes of action differ. There seems to be logically no escape from these propositions and conclusions, and they correctly express the theory and result of the earlier cases. They are apparently disregarded in the majority of cases which have been decided by the appellate courts in Texas in recent years. If it be conceded that, considering the facts of these cases, the results reached were proper, then it would seem that the courts, instead of announcing the rule in a set form of words, and twisting its meaning to suit cases, should reject the formula in which the rule is expressed, go back to the principles on which it is founded, apply them and announce that the rule no longer expresses fully the law, and will not be enforced in those cases which do not come under it. It would clear up the confusion to a large degree if the courts would do this, and change the language used to express the law on this subject so as to make it embody substantially the following ideas—that the amendment is to be regarded a continuance of the suit as originally brought, and not the beginning of the new one, in the following cases: First, those in which, strictly speaking, the two pleadings set up the same cause of action, and the amendment is a mere amplification or better statement of the matter contained in the original; and second, in all cases in which the amendment sets up additional matters directly connected with or growing out of, the previously pleaded transaction, and so germane thereto that they could have been embraced with them in the first pleading, by use of general terms descriptive of the cause of action, and have been good against a general demurrer, even though there should be such difference in the details of the two pleadings that the same evidence would not sustain both.

To illustrate: In *Aury v. Mansur & Tibbetts Implement Company*^{*} it is held that general allegations of fraud, though bad on special, are good on general, demurrer, and that testimony can be received under

^{*} 37 S. W., 466.

them to sustain the charge. If a case were brought charging fraud in general terms, there can be no doubt that an amendment could be made specifying particular facts as constituting the fraud, and that this would be the same cause of action. Suppose afterward another amendment were made setting up still other facts concerning the same transaction constituting a distinct fraud so different from that set up in the first amendment as not to have been admissible under its allegations. Here there would be a different cause of action in the second amendment from that set up in the first, but both would be included in the general charge of fraud, as set out in the original, and the second amendment should be permitted as a continuance of the original suit. But if the facts alleged in the second amendment related to different transactions although they might be fraudulent, or if they related to the same transactions but had no connection with fraud, but alleged some matters of a different nature, the second amendment would set up a new cause of action and be regarded as equivalent to bringing a new suit, as to such matters.

This is the real result of the recent decisions, though expressed in different language from that employed by the judges. Leaving out any reference to the phrases, "cause of action," or "ground of defense," we may say that our courts have held that if the amendment sets up facts regarding the same transactions as that set up in the original pleading, and so germane to it that it is reasonably apparent from the pleadings that they refer to the same matters, and that it was the intention of the pleader in preparing the former pleading to litigate the matters set up in the amendment, the amendment will be regarded as a continuation of the suit, and not the institution of a new one. If the facts do not come within this rule the amendment, as to the new matters, is the beginning of a new suit, and all defenses to that much of the pleading are to be tried and determined on that basis.

If the defendant has answered in the original suit, leave to file the amendment during term time, or the notice required under the statute as to amendments in vacation, is all the notice of the new cause of action that is required. If he has not answered, he must be cited as in bringing a new suit. Just what length of time he has in which to answer this new suit does not seem to be certainly fixed by the statute or rules of practice, but is left largely to the discretion of the court.⁹

⁹ *Morrison v. Walker*, 22 Texas, 19; *Weatherford v. Van Alstyne*, 22 Texas, 22; *De Walt v. Snow*, 25 Texas, 321; *Erskine v. Wilson*, 27 Texas, 118.

Amendments of Verified Pleadings.

The pleadings by the plaintiff which are required to be verified in the Texas practice in order to entitle him to a trial upon the merits and to the relief which may be properly awarded him, either at law or equity, upon such trial are very few. Verification of the plaintiff's pleadings is with few, if any, exceptions, required only as a basis of some relief pending the litigation. From this it naturally results that the right to amend verified pleadings must be considered from two points of view: first, its effect upon the temporary relief obtained or desired; second, its effect upon the permanent relief to be awarded upon the final trial. It follows that the rules with regard to such amendments vary, according to the nature of the verified pleading and the purpose for which it is filed. It is desirable to consider the kinds of verified pleadings separately with the general statement; that all such amendments must be verified.¹⁰

Attachments.

There is no requirement that the petition in attachment,¹¹ sequestration, or garnishment suits should be sworn to. The statute does, however, require that neither of these writs shall issue until a petition and an affidavit embodying certain facts, designated by statute, have been filed. The statute does not state whether these shall be separate or combined, and the practice with regard to this varies; in many instances the facts required in the affidavit are embodied in the petition, and the petition sworn to and filed in the case, thus making one instrument answer a double purpose; first, as a pleading seeking temporary relief and permanent relief upon a final hearing; and second, as an affidavit of facts entitling to temporary relief. In other cases, separate instruments are filed—one a petition and the other an affidavit. Both petition and affidavit, either in the same or separate instruments, are essential to the issuance and maintenance of the attachment, and it is also essential that these instruments be in substantial harmony, and a variance in any material respect between them is fatal to the attachment. So it is readily seen that abundant opportunity for complication exists.

Let us consider, first, those cases in which the petition and affidavit are filed separately. No difficulties arise as to the right to amend the petition in such cases, so long as the amendment and the original petition set up the same cause of action, and are in substantial harmony

¹⁰ *Bland v. State*, 36 S. W., 914.

¹¹ Rev. Stats. 1895, title X; *Primrose v. Roden*, 14 Texas, 1; *Schrimpf v. McArdle*, 13 Texas, 368; *Morgan v. Johnson*, 15 Texas, 569.

with the affidavit. In such case the affidavit is the real basis of the attachment, and the petition is only the pleading asking for the relief appropriate to the facts as set out in the affidavit. But when the plaintiff seeks to so amend as to set up a new cause of action, different principles apply. If he files such an amendment and abandons his original cause of action, this would seem necessarily to be an abandonment of his attachment and all the rights thereunder. If he amends the petition, and sets up a new cause of action in addition to the one contained in the original petition, and makes any material departure with regard to the latter, the attachment would still continue as to the original cause of action, and any judgment that might be obtained upon it would entitle the plaintiff to the securities and priorities obtained by the attachment; as to the new cause of action, the lien would not apply, and any recovery based upon it would not be entitled to any benefit arising from the attachment.

Considering next those cases in which one instrument is filed to answer the double purpose of petition and affidavit, it would appear on the surface, that as an affidavit can not be amended under any circumstances, the right to amend in such cases would not exist. Further consideration, however, will show this position to be untenable. The instrument filed in such case has a dual nature. It is, first, a pleading, and second, an affidavit of facts essential to the procurement of the attachment. It may be abandoned as a pleading and still be retained as an affidavit, and this is practically what is done by filing amended pleadings in such cases. While the original would no longer be on record as a pleading, it would stand after the amendment as a separate affidavit, and so long as the amended petition and this affidavit were consistent, the same results should follow as would if the paper had been originally designed solely for use as such affidavit. So that this class of cases does not, in reality, differ from the first. I have not found any authorities, in terms, recognizing and announcing this treatment of the subject, but it is in harmony with the decisions, and seems to be the simplest view of the subject, and correct.

If the doctrines announced above are true, the only practical difficulty in these cases is in determining whether the original cause of action is preserved in the amendment or the amendment sets up a new cause of action; and if the second, then whether there is any material variance between it and the affidavit supporting the attachment. If the original cause of action is preserved and there is no material variance, all rights under the attachment are preserved; if, however, the original cause of action is abandoned or there is a material variance between the pleading and the affidavit, the attachment is subject to be quashed, and all the benefits of it would be lost. The rules for determining what is, and what is not, a new cause of action are the same as those which apply in the ordinary cases already discussed. Where the cause of action

remains the same, the rules for determining the extent of modification or variation permissible in the cause of action, without defeating the attachment, seem to be vague and undetermined. On the one hand it is stated that as these extraordinary remedies are purely statutory, and in derogation of common right, that the statutes and all proceedings under them must be strictly construed against the plaintiff. Under the influence of this doctrine, slight modifications of the cause of action have been held fatal to the attachment. On the other hand, it has been held that reasonable construction should be given to the several instruments, that is, the original petition, the amendment, and the affidavit upon which the attachment is based, and if there be such substantial conformity between the affidavit and the original as to harmonize these two, and sustain the attachment up to the date of the amendment, and then such substantial conformity between the affidavit and the amendment as to sustain the attachment after that, the writ will be upheld. The latter seems to be the better doctrine, and the trend of the later opinions is in that direction.

It must be borne in mind that the affidavit for attachment must be sufficient in itself and can never be amended; and it is in its capacity as an affidavit that all right to amend the original petition has been denied in some cases in which the petition and the affidavit were embodied in one instrument.

There are a number of early cases which announce the doctrine that petitions in attachment suits must be sworn to. This is true in suits in which the petition and affidavit are combined, and there is no other affidavit in the case upon which to sustain the attachment. Where there is such separate affidavit, sufficient in itself, there is no requirement either by statute or rules of practice that the petition should be sworn to.

There is no class of cases in which the pleader should be more careful and accurate than those in which these extraordinary remedies of attachment, sequestration, garnishment, etc., are sought. These writs are edged tools and must be handled with care, or they result in greater injury to the plaintiff than the defendant. It is a little more trouble, but is always preferable, unless time is too pressing to have the affidavit and petition separate. This is especially true in that class of cases in which attachments are sued out before the maturity of a debt in whole or in part. In such suits, amending the original petition is almost a necessity, and difficulties will be avoided if the petition be kept separate from the affidavit.¹²

¹² Petition may be amended: *Pearce v. Bell*, 21 Texas, 688; *Culbertson v. Ca-been*, 29 Texas, 247; *Tarkington v. Broussard & Co.*, 51 Texas, 550; *Marx v. Abramson*, 53 Texas, 264; *Evans & Martin v. Tucker*, 59 Texas, 250; *Willis v. Mooring*, 63 Texas, 340; *Railway Co. v. Telegraph Co.*, 69 Texas, 282, 6 S. W.,

Injunctions.

It has been held that petitions for injunctions may be amended as other pleadings.¹³

Verification of Defensive Pleadings.

Pleas in behalf of the defendant which are required to be verified may be divided into three classes. First, pleas in abatement; second, pleas in bar in reply to some verified pleading by the plaintiff seeking temporary relief and designed to prevent such relief pending the litigation, as an answer to an injunction suit and other similar pleas; and third, pleas setting up defenses which, under the statute, can only be interposed by answer under oath.

Pleas in Abatement.

Pleas in abatement must always be sworn to unless their truth is apparent upon the face of the record in the particular case in which the plea is filed.

Pleas in abatement may be amended just as unsworn pleas; of course, if there be contradiction and misstatements, special exception should be made to prevent prejudice against a party by reason of the conflicting sworn statements.

Due order of pleading requires that pleas in abatement precede pleas in bar. It has, however, been held that where an answer is filed containing a plea in abatement and an answer to the merits, this reserves the right to amend the plea in abatement so interposed at any subsequent time, and that such amendment would not be regarded as coming after the plea to the merits filed theretofore. If, however, the answer formerly filed did not contain any plea in abatement, none could be set up by a subsequent amendment; nor does filing a plea in abatement of one kind, predicated upon one state of facts, preserve the right by amendment to plead other and different matters in abatement at a later stage in the proceedings.¹⁴

In each of the other two classes of defensive pleadings, estoppel and confession and avoidance, the right to amend is not affected by the fact that the particular plea is required to be verified, as such pleadings are

563; *Latterloh v. McIlhenny*, 74 Texas, 73, 11 S. W., 1063; *Avery v. Zander*, 77 Texas, 207, 13 S. W., 971; *Munzenheimer v. Manhattan Co.*, 79 Texas, 318, 15 S. W., 389. Amendment of verified pleadings: *Lee v. Hamilton*, 12 Texas, 413; *Forbes v. Davis*, 18 Texas, 268; *McDonald v. Tinnon*, 20 Texas, 245.

¹³ *McDonald v. Tinnon*, 20 Texas, 245; *Bland v. State*, 36 S. W., 914.

¹⁴ *Caldwell v. Lamkin*, 12 Texas Civ. App., 29, 33 S. W., 317.

never designed as a basis for affirmative relief, and no change in them, except in very rare instances, could affect the rights of the parties pending the litigation, and no objection to amending could be made on that account, and so far as they tender issues for final adjudication, of course, an amendment would not be more prejudicial than in cases of pleadings not required to be verified.¹⁵

It may, of course, occur in some cases that the nominal defendant may be the real actor or party seeking affirmative relief in some matter set up by him by way of cross-action; as to such matters, while in name a defendant, he is really the plaintiff, and his rights and the rules of practice applicable to his cause of action are the same as in cases of other plaintiffs.

SUPPLEMENTAL PLEADINGS.

The office of a supplemental pleading, whether petition or answer, is to reply to the new matter either in confession and avoidance, or in estoppel or by cross-action, contained in the last preceding pleading by the adverse party. It may meet this new matter with either legal or fact defenses. That is, it may demur to this new matter and take the judgment of the court as to its legal sufficiency as a reply to the pleading in response to which it is filed, or it may deny the truth of such new matter, in whole or in part, or it may confess and avoid it or set up matter in estoppel against it. In short, supplemental pleadings are the means provided by law to interpose each and every defense to the new matter set up by the adverse party in his pleadings, except a general denial of the facts. This is presumed by law in absence of any reply.¹⁶

There is nothing peculiar as to the form of these pleadings. They should, of course, be entitled on the face of the first page, as of the case in which they belong; should be properly indorsed with the style and number of the case and the proper designation of the instrument, as plaintiff's first supplemental petition, or defendant's second amended first supplemental answer, just as the case may be. The general rules as to preparation of original pleadings, requiring fullness, conciseness, etc., permitting separate counts or grouping of facts, etc., should be followed so far as applicable. That is, if the new matter to which the supplement replies is not good in substance as a response to the pleading to which it is interposed, the defect can be reached by general demurrer; but if it is good in substance but is bad in form, this

¹⁵ *Baker v. Wahrmond*, 5 Texas Civ. App., 268, 23 S. W., 1023.

¹⁶ *Rev. Stats. 1895*, art. 1193.

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can only be reached by a special exception. So, if the new matter is such that if originally plead by a plaintiff the defendant would be required to answer it under oath, a supplement denying it must be verified, and so ~~through~~ the whole process, for the rules as to preparation of original pleadings govern in the preparation of supplemental pleading, except in those few particulars as to form, etc., which in their nature could not be applied.

CHAPTER XIII.

PLAINTIFF'S ORIGINAL PETITION.

The eight parts of the plaintiff's original petition are:

First.—Marginal venue.

Second.—Term of court.

Third.—Address.

Fourth.—Commencement.

Fifth.—Count or statement of cause of action.

Sixth.—Prayer for relief.

Seventh.—Signature.

Eighth.—Indorsement.

I have found no authority making either of the first three mandatory, but they are certainly in good form, are according to precedent and conducive to intelligent statement, and it is well, therefore, to recognize and use them.

MARGINAL VENUE.

The marginal venue is the statement of the county and State in which the suit is brought. It is usually placed in the left hand upper corner of the first page of the petition. This gives an easy and ready way to ascertain upon inspection of the pleading the venue of the suit.

TERM OF COURT.

The term of the court is usually stated in the upper right hand corner of the same page, just across from the marginal venue, so that the time and place of suit are both readily apparent at the opening of the petition.

THE ADDRESS.

As each original petition is a request for the exercise of the power of the government to right the wrongs complained of, it is proper that it should be addressed to the representative of government, who is

intrusted with the exercise of this power. This representative, as we have seen, is the court having jurisdiction over the case and not the judge of such court personally or officially; hence it is best in ordinary cases to address the petition to the proper court. In some instances in which the plaintiff wishes an interlocutory order from the judge, it may not be specially objectionable to address the petition to him, and many good practitioners do so address it in all cases; and others address the court or the judge indifferently. It is not a matter of special moment, but the better form is to address the court.

COMMENCEMENT.

The statute says that the petition must give the names and residences of all the parties to the suit. Nothing is said as to the place in the petition where this information shall be given, but it is logical to advise the court at the outset who it is that is complaining to it and against whom the complaint is made. This method is also convenient and sustained by the best precedents. It was required at common law and in equity that the full names of the parties, christian and surname, should be given, but here this, while the better form, is not required, and suit may be maintained for or against a party by the initials, one or both, of his christian name followed by his surname. The residence of each of the parties should also be stated in this part of the pleading. The capacity in which the suit is brought by the plaintiff and against the defendant should also be stated. It is always presumed in the absence of direct allegation to the contrary, that the parties to the suit sue and are sued in their individual capacities, and if in any given case, they, one or both, are before the court in any other, this must be clearly and appropriately set out.¹

CAUSE OF ACTION.

The general principles governing this subject have been given in preceding chapter on General Principles, but an attempt at application will be made, with the hope that some assistance may be derived therefrom. The statute is:

"The petition shall set forth clearly the names of the parties and their residences, if known, with a full and clear statement of the cause of action, and such other allegations pertinent to the cause as the plaintiff may deem necessary to sustain his suit, and without any dis-

¹ For authorities and further statement of rules, see Chapter VIII, on Parties.

inction between suits at law and in equity, and shall also state the nature of the relief which he requests of the court.”²

The adjectives used here as descriptive of the statement are “full” and “clear.” In the general statute as to pleading heretofore quoted the expression is a “logical and legal statement.” So, together, the statutory requirements as to the statement of the cause of action are that it must be full, clear, logical, and legal.

The meaning of “fact” must be kept in mind. The term, in its ordinary sense, includes everything of which existence, past or present, may be affirmed. In regard to pleading its significance is, anything that now is, or has occurred, or been accomplished, and all conditions, past or present, the existence or nonexistence of which may be established by testimony and decided without involving in so doing the determination of one or more questions of law.

A full statement is one directly alleging every fact essential to the cause of action, leaving nothing to be inferred or supplied.

A clear statement is one concisely and accurately expressed so that it can be readily and certainly understood; one free from doubt and ambiguity, not confused, nor verbose, nor obscured by surplus matter.

A logical statement is one arranged in proper order on a rational basis, each part naturally and reasonably growing out of and supplementing that preceding it, and leading up to and properly introducing that succeeding it, so that the statement makes a thoroughly connected and perspicuous whole through which runs an unbroken chain of natural sequence.

A legal statement is one made in conformity with the rules and requirements of law.

The statement of the cause of action should have all these characteristics.³

Rule 4 of the Supreme Court for county and district courts is:

“The plaintiff, in the original petition, in addition to the names and residence of the parties and the relief sought, may state all his facts, so as to present together different combinations of facts, amounting to a cause or causes of action, as has been the usual practice, or he may state the cause or causes of action in several different counts, each within itself presenting a combination of facts, specifically amounting to a single cause of action, which, when so drawn, shall be numbered, so that an issue may be formed on each one by demurrer.”

This is an apt summary of the statutes and decisions on the manner of presenting the facts, and scarcely needs explanation. There are some of the older cases in which it is said that the “count” has no

² Rev. Stats. 1895, art. 1191.

³ For further explanation of these matters see Chapter XI, on General Principles.

place in our system. Technically this is so, but the grouping together of the facts according to one construction of the evidence or theory of the case, and making a clear and logical presentation of them in such connection as to present that theory; and then again grouping them according to other constructions or theories, and making a clear and logical presentation of them in connections presenting these other theories is certainly permissible, and in complicated cases almost indispensable.

Whether the facts shall be given in different groupings or not lies largely in the discretion of the pleader, and if his petition presents his case fully and accurately in its several phases in the one form or the other no objection as to form can be made to it.

If the petition presents the case in one phase only, then all its parts should be consistent. If there are different combinations of fact, presenting different theories or phases of the case, so much of the pleading as is designed to present each phase or theory must be consistent with itself; and this is true, whether the pleading presents the case by separate paragraphs or by more formal counts; but the parts presenting different phases need not be consistent. That is: If the case has many facts capable of several constructions, and leading to different legal results, so that if the court and jury should find that certain of these facts are true and others not true, the plaintiff would be entitled to one relief; but if they should believe certain other portions of the evidence, and disbelieve others, then the relief to which he would be entitled would be different; it is permissible for the pleader to group the facts entitling him to one relief, and state them together in a separate count, closing with prayer for the relief appropriate thereto, and then to group into another count the facts which would entitle him to another relief, and close it with a prayer for that relief, and continue this course until all the different theories of the case were presented. This would be the presentation of his case by separate counts. When this method is adopted all the facts in each count should be consistent with each other, and with the relief prayed for in it.

The facts so grouped need not be confined to a single issue, as at common law, but may be double or multiform, if they are of the same general kind and could exist together. If the facts are inconsistent and so could not all exist together, they should not be plead in one count, for that would make the count destructive of itself. This rule, requiring consistency, does not apply as between the different counts, and these may be inconsistent without making the pleading bad; indeed, the only purpose of counts or groupings of facts in our system is to enable the pleader to present the different and inconsistent combinations of fact which, he thinks, may be proved on the trial, and by this method lay a basis for relief, whichever view may be taken of the testimony.

On the other hand, the pleader in such a case is not compelled to re-

sort to different counts, but he may state in different paragraphs or together all the facts which are common to the several theories or phases of the case, and having thus gotten into the record these common facts, may, by additional paragraphs, present separately those sustaining the different phases or theories of the case. Thus, if there are a half dozen facts which are relied on in all the different theories these could be grouped and stated together, or in separate paragraphs, numbering them if preferred, and then an additional paragraph or series of paragraphs could be added referring to those preceding, and setting out in connection with them one phase or theory of the case, concluding in an appropriate manner; and then other paragraphs could be added, referring back, and connecting with the earlier paragraphs, which are common to all the phases of the cases, which would thus be made a part of this presentation also, and then setting out the additional facts necessary to the presentation of another phase of the case, and so on, until all the different theories were covered by the petition.

In such case the rule as to consistency is the same as when the plan of presenting by counts is chosen; that is, all the facts relied on to present a single phase or theory of the case must be consistent with each other, but those presenting one theory need not be consistent with those presenting another.

We reach the difficult part of the pleader's task at this point. He must state the facts constituting his cause of action. This puts to the test his knowledge of substantive law. He can not select the facts to plead unless he knows what facts give rise to, or constitute, a cause of action. A cause of action is said to consist of three elements: the plaintiff's right; the violation of this right by defendant; and the legal injury to plaintiff by reason of such violation. And ordinarily a full and clear statement of a cause of action must contain a direct allegation of every fact going to make up each of these elements.

The first thing to be seriously considered in this connection is that it is the plaintiff's cause of action which must be plead; not a cause of action generally, nor one existing in behalf of some person other than the plaintiff. It would be wholly useless to state to the court as a basis of relief for the plaintiff some right existing in another—it must be his right, in order to entitle him to come to the court for relief. Not only must this right exist in him, but it must exist in him in the very capacity in which he sues. If a man be the executor of an estate, and has certain rights as such, he can not sue individually and recover on such rights; nor can he sue as an executor and recover on rights personal to himself. This doctrine is carried so far that even in the case of husband and wife, although the husband may sue in his own name for the wife's separate property, by making the proper allegations as to its ownership by the wife, he can not sue thus in behalf of his wife, make proper averments with reference to the rights of his wife, and

recover on facts showing the property to be either his separate estate or community. The variance between the right claimed by him for his wife in the pleadings, and that proven in his own or community right by the evidence, would be fatal.⁴ So the first inquiry is always—in whose behalf does the right exist, and then in what capacity does it exist in him?

Legal Rights and Duties.

This is not an appropriate place to attempt to discuss substantive law, yet some consideration of the question of legal rights and duties seems to be indispensable to an intelligent presentation of the matter in hand.

A legal right has been defined by several authorities of repute as the capacity existing in one or more persons to control by law certain definite acts or forbearances of another or others. It is possible that this definition has hidden in it all that constitutes a legal right, but it is not very readily apparent. There seems to be some idea of privilege or advantage in the thing, as to which the right of control over another exists, which is not clearly conveyed by the definition given above.

It therefore seems preferable to say, that a legal right is some claim, interest, advantage, or privilege which one enjoys under the recognition and sanction of the law, and which is secured to him by the sovereign by giving to him capacity to control by law the conduct of others with reference thereto, or with reference to the things to which it appertains.

The idea conveyed by either definition is sufficiently accurate for our present purpose. Legal rights are usually divided into personal rights and property rights, or those which one enjoys with reference to himself and to other persons in his social, political, and religious relations, without reference to specific things; and second, those which he enjoys with reference to some thing or things, in or to which he has some special claim, interest, or estate.

As a legal right involves the capacity to control by law, its correlative legal duty involves subjection to control by law. These terms "legal right" and "legal duty" are different expressions of the same idea looked at from opposite points of view. If A owes B one thousand dollars, A has a legal right to demand payment of the money from B; B owes the legal duty to pay A; payment by B discharges A's right and B's duty; failure to pay by B is a violation of A's right and a breach of B's duty.

⁴ Owen v. Tankersley, 12 Texas, 405; Hatchett v. Conner, 30 Texas, 104.

A legal right existing in one person and a corresponding legal duty owed by another constitute a legal relation between the persons, and the recognition of this relation by the law, and providing a remedy in behalf of the person having the right against the person owing the duty, compelling the recognition of the one and the fulfillment of the other, constitute the legal obligation or tie between those persons.

The nature and extent of these rights and duties between the parties are dependent on the conditions or states of fact existing between them.

There are three general classes of these conditions: first, the ordinary social conditions existing generally among all persons; second, special conditions existing between certain persons, not resulting from contract between them, although in many instances they grow out of contracts between others; and third, special conditions existing between certain persons as the result of contract between them.

In any case submitted, it is necessary to understand in which of these classes the case falls before the petition can be properly prepared.

The legal rights and duties existing between parties in the first class are practically the same between or among all persons. They grow out of general social relations, and no special conditions have to be alleged or shown as a basis for such rights or duties. This is not true as to either of the other classes. In each of them the rights and duties grow out of special conditions or states of fact, and consequently they vary according to the varying facts in each different case. In the second class the conditions, though special, do not depend upon any contract entered into between the persons whose rights are being investigated, but the special rights and duties are imposed by law without the concurrence of the wills of the parties affected thereby. In the third class, these special rights and duties grow out of special conditions brought about by voluntary act of the parties in entering into the special relation by contract. Sometimes, from considerations of public policy, the law determines what shall be the respective rights and duties between parties who have by contract established certain relations or conditions of fact between them, and whenever any persons bring themselves into such relations by agreement, the law fixes the respective rights and duties between them consequent thereupon, although they may not have been in contemplation of the parties at the time they entered into the contract, and in a few isolated cases even though they have been specially provided against in the agreement. In other cases the rights and duties of the parties are not imposed by law, but are voluntarily assumed by the agreement, and depend upon such agreement for their existence. These last are contract obligations, and violations thereof are breaches of contract; all others, that is, all under the first class, all under the second class, and all under the first subdivision of the third class, are obligations imposed by law, and viola-

tions of any of them constitute torts, as contradistinguished from breaches of contract.

Under the first class of these rights and duties fall most of those rights usually known as personal; such as the right of life, bodily safety, freedom of person, of reputation, or religious liberty, etc. In the second class of these rights and duties fall such as exist between parent and child, as such; between an officer and private citizen; and between all other persons sustaining special relations toward one another, not growing directly out of contract between them. This second class also embraces most property rights; that is, rights in some specific thing or *res* which do not grow out of contract between the persons between whom the rights and duties exist. For illustration, A buys a tract of land from B. His right in the land grows out of his contract with B, sanctioned by law. These rights as between him and B may, in an imperfect and qualified sense, be said to be contract rights; but A's rights in the property as against all other persons except B are in no sense dependent upon contract between A and them; but certain conditions of fact exist which, sanctioned by law, give to A the capacity to control all other persons with reference to that particular tract of land. Therefore, in considering whether or not rights and duties of this sort exist, it is essential to examine into the facts and ascertain whether the special and exceptional conditions exist upon which alone such rights can be based. If these conditions do exist, that much of the case is shown; if they do not exist, it is useless to proceed further with the matter.

In the third class fall all those rights and duties, whether of person or of property, which come into being upon the voluntary assumption by contract of certain relations between the parties between whom the rights and duties exist, whether these rights and duties are imposed by law, without, or even against, the assent of the parties, or are consciously or purposely undertaken by them in the contract.

Not only must the pleader ascertain the existence of the facts which constitute the relations between the parties, but if the case falls within either the second or third class above mentioned, that is, is one in which the rights and duties of the parties depend upon the existence of special conditions or states of fact, the facts constituting such special conditions must be affirmatively and directly alleged in the petition.

Cases falling within the first class, that is, in which the conditions are such as generally and almost universally obtain, the facts showing the conditions out of which the right grows do not have to be alleged by specific and direct averment. To illustrate: If A complains against B for having made an assault and battery upon him, it is not necessary to consider whether there was any special relation existing between the parties, because A has a right to personal immunity, recognized by law, against all persons, in the absence of some exceptional

conditions which would change the rule. That is, A has a legal right to bodily safety as against all persons, including B, and all persons, including B, owe A the legal duty to refrain from injuring him by battery, and A does not have to show that any special relation existed between him and B as a basis for B's liability for violation of this duty. There are, however, a few exceptional states of facts which would destroy A's right to immunity, and give B the right to use force upon A's person. These being special conditions inuring to B's benefit, they would be matters of defense to be alleged by him and would not have to be anticipated and negatived by A in his petition.

If, however, A desires to sue B for an assault and battery not committed upon himself but upon C, the minor child of A, here the conditions are different, for ordinarily one person has no right in the personal safety of a third person, and, consequently, no control over the conduct of another with reference to such person, and as a basis of A's right against B as to the person of C, A must allege affirmatively the special conditions giving him such right, to wit, that C is a minor child of A, to whose service he is entitled, and for whose expenses he is legally liable, and that by reason of the battery upon him by B, he, A, has lost the value of such services, and it became his duty to incur and he did incur the specified expenses. This is an illustration of one kind of cases falling within the second class, for the relation of parent and child existing between A and C is not one growing out of contract between the parties, yet it is a special relation not existing among persons generally. An illustration of another kind of cases falling within this class is an action of trespass to try title to a tract of land. A buys a tract of land from B, and C unlawfully enters upon it. A sues C in trespass to try title, and attempts to control C's conduct with reference to this tract of land. There are no contract relations between A and C, but A sustains towards the land upon which C has entered certain relations growing out of his contract with B regarding it. This is not a right, existing in A by reason of ordinary social conditions, but depends upon the special facts vesting the title to the land in him; and it is, therefore, necessary in a suit regarding it for him to aver in a legal way the fact of his ownership of the land as a basis of his right to control C's conduct regarding it.

As an illustration of contract obligation in the third class we may take the following: A enters into contract with B, employing him to work for him for a year for certain compensation. This contract brings into existence certain legal relations between A and B as a direct consequence of their voluntary action. Under it A has a right to demand of B the services contemplated, and B owes A the duty to perform them. B has a right to demand, and it is A's duty to pay, the compensation contemplated. Each right in such case is dependent upon the discharge, or the tender to discharge, its correlative duty by the

other party. If such contract is violated by either party, as if A refuses to pay B, B would have to show the special conditions existing between them, that is, first, the contract between him and A, making every allegation necessary to show a legal obligation between them, and second, that he (B) had performed or tendered performance of his part of the undertaking. This is so because the first is essential to show his right to earn the money by rendering the services, and the second is essential to show that he has earned it by compliance with the duty resting upon him. A petition by B, in a suit against A for his wages, must aver all these facts. These legal relations between A and B, growing directly out of the contract, are not, however, all of its legal results, and from it may arise relations of the second class. By virtue of the agreement A has become entitled to B's services during the term contemplated by the contract. If, therefore, C should do some unlawful act which directly incapacitates B from rendering the services due A under the agreement, such act by C is a violation of A's legal rights; not because there is any contract between A and C, but because, by reason of the contract between A and B, A has certain legal rights in B, and his capacity to render the services during the time specified. In suit against C for the violation of the right, these conditions being special, A would have to aver every fact constituting them; that is, he must show the contract of employment between him and B, and that B was performing, or was ready and willing to perform; that C's act was unlawful, and that it directly incapacitated B from rendering the services which he would otherwise have rendered, and that such prevention was a legal injury to A. An illustration of obligations growing out of certain conditions originating in contract, but which not only are not dependent on the contract, but contrary to the real intent of the parties in entering into it, is found in some contracts for domestic shipment of freight. Thus, A is a common carrier, and B desires to ship freight over his line of road to some point within the State, B tenders the freight in proper condition for shipment, and they enter into an agreement by which A undertakes to transport the freight on terms contrary to the Texas statute governing such shipment. Here the parties by their conduct have established certain relations between them, and have gone further and attempted to regulate, by agreement, the legal rights and duties growing out of such relations. Ordinarily, persons may contract with reference to their own business as they see fit, but in this case one of the parties is a common carrier, and as to this class of persons the State imposes limitations upon the right to contract, and notwithstanding A and B have undertaken to modify by agreement, their rights and duties as fixed by law, those portions of the contract providing for such modification are void and inoperative. Here, if A did not transport the freight according to the requirements of the law, B could bring suit, plead the

fact that A was a common carrier, and had received the freight for transportation, giving the facts showing that it was domestic commerce, and he could ignore those terms of the contract which are contrary to the law, and rely upon the rights and duties established between them by the law.

The Plaintiff's Rights in Suits for Torts.

A tort is the breach of a duty recognized or created by law, not dependent upon the assent of the person by whom it is owed, and the petition in every suit for a breach of such a duty must distinctly and appropriately aver every fact which exists as a legal basis of such duty.

If the case be one falling in the first class above given—when the right is dependent on general, and not special, conditions—such conditions, as before stated,⁵ are presumed to exist, and need not be positively averred.

If it fall within either of the other classes, and depends upon special conditions, these must always be averred. If among these conditions there is a contract, either between the parties to the suit, or others, the legal effect and consequences of which are involved in the suit as constituting the basis of the right claimed, the contract, or so much of it as is the basis of the right claimed, must, as a rule, be set out with sufficient particularity to enable the court to judge for itself of the rights of the parties under it.

In cases in which the right involved in the suit does not exist at common law, but is given by some constitutional or statutory provision, as in suits brought on account of injuries resulting in death, the provisions of the Constitution and statutes must be carefully studied, and the petition must show the existence of every fact made essential to the existence and enforcement of such right.

The Plaintiff's Rights in Suits on Contract.

There seems to be some disagreement among the law writers as to the proper definition of a contract, and I shall not undertake the difficult task of making a correct selection from among the many suggested. The essentials of a contract seem to be: first, competent parties second, legality of purpose; third, legal consideration; and fourth, actual meeting of the minds, including both understanding and will. For any agreement to be the basis of a right legally enforceable, it must possess all these elements; and according to the general rules

⁵ Ante, p. 271.

of pleading, the existence of each should be made apparent in a petition setting up rights under an agreement. It must, however, be remembered that there are several exceptions to these general rules, as well established and as universally recognized as the rules themselves. Among these is the one which relieves the pleader from the necessity of stating facts or conditions which in the common experience of men are found almost always to exist, and which puts on the adverse party the necessity of pleading the exceptional conditions, if there are any, in any particular case. Both of the first two elements of contract—competency of parties, and legality of subject matter—come under this exception. It is so nearly always true that parties to an agreement are competent, and that the subject matter is lawful, that for convenience of all parties the plaintiff is ordinarily excused or relieved from the necessity of either pleading or proving these facts, but each is presumed to exist unless the defendant specially pleads the contrary.

Consideration.

The civil law knew nothing of consideration as recognized at common law as an element of contract, and hence there were no rules of pleading on that subject in that system.⁶ The common law, on the other hand, regarded the requirement of consideration as an element of all ordinary contracts as one of its most valuable and cherished doctrines.

The Congress of the Republic of Texas in 1840 having adopted the Common Law of England as the rule of decision in all matters of substantive law as to which there were no constitutional or statutory provisions, and having at the same session refused to adopt the common law system of pleading and retained the former civil law system, there necessarily arose some confusion as to the real rights of parties and the methods of practice in securing the advantages of these rights through the court. There have been several statutes on the subject passed in the hope of relieving this confusion, and others which, though not directly on the subject, affected it to a considerable extent. To appreciate these articles and the present state of the law requires some discussion of the rules of the common law at the time of its adoption here.

The Common Law of England, used in its broadest sense, as was evidently the intent of Congress in its adoption, embraces the ancient common law as modified by later growths and decisions if not by acts of **Parliament**. It clearly included the rules and doctrines governing negotiable instruments, designated as the law merchant, hence these must be taken into account in dealing with the question. In this

⁶Las Partidas, partida 5, title 11, pp. 780-818; Pollock's Elements of Contract, 132, et seq.

broadest sense the Common Law recognized two distinct classes of contracts:

1. Contracts embraced in and governed by the Law Merchant as contradistinguished from the Ancient Common Law.

2. Contracts embraced in and governed by the Ancient Common Law.

The first class embraces all promissory notes, bills of exchange, and checks, which came up to the law merchant standards. That is, all absolute written promises or orders by a certain person to pay a certain person a certain sum of money at a certain time. The details as to these papers and their characteristics must be gotten from works on commercial paper. It is sufficient here to say that the law merchant, which is most probably an outgrowth of the civil law, knew nothing of consideration. The idea of *quid pro quo* did not enter into its conception of contract; what a man promised another in form of law merchant paper to do he was expected and required to perform, whether the promise were based on a consideration or purely voluntary. The common law did not recognize the enforceability of simple agreements made without consideration, and such promise unsealed, though in writing, had no validity according to its teachings. When the merchants of Continental Europe brought their business, and their customs and rules regarding it, into England, conflict between the two systems was inevitable. The result was a compromise. The law merchant yielded so far as to recognize that no promise unsupported by consideration could be enforced, and the common law yielded so far as to permit the presumption that all paper of the law merchant was based on valuable consideration, and established the rule that in suing on such paper, consideration need not be either plead or proved, but if in any case there were in fact no consideration supporting the promise or undertaking, the party relying on this as a defense should be required to plead and prove it.

This was the law regarding such paper at the time of the adoption of the common law for the government of our substantive rights, and the introduction of evidence. This has ever since been held to be the proper rule regarding such paper,—promissory notes, bills of exchange, and checks,—and it is not necessary to plead consideration for such paper, nor to offer proof of it in any case unless consideration is denied under oath, and then the simple production of the paper makes out a *prima facie* case of consideration, and the party setting up the want or failure must affirmatively prove his contention.⁷

Contracts of the other class, that is, those not coming within the

⁷ Jones v. Holliday, 11 Texas, 414; Buchanan v. Wren, 10 Texas Civ. App., 560, 30 S. W., 1077; Bigelow on Bills and Notes, p. 5; Daniel on Negotiable Instrument, secs. 160, 161.

rules of the law merchant, but depending on and governed by the ancient common law, which class includes all contracts except those falling within the law merchant as above stated, were by the ancient common law divided into two classes: first, contracts under seal called "specialty contracts," and in which were included all deeds and bonds, that is, all sealed instruments; and second, contracts not under seal and known under that law as "parol contracts," which term at that time embraced all agreements enforceable by law whether written or oral, which were not under seal

Contracts of the first class, that is, those under seal, imported consideration, those of the second, that is, unsealed contracts whether oral or written, did not import consideration.⁸

In suing on sealed instruments at common law, it was not necessary either to allege or prove consideration. This was presumed. Whether this presumption was conclusive or merely *prima facie*, the authorities do not seem to be entirely agreed. Though it seems that the seal was a substitute for consideration in the first instance, that is, if a promise were entirely without consideration, still, if it were evidenced by a sealed instrument it would be enforced, and the plea of original want of consideration was not good, the form of the contract in such case taking its place; but if the parties had not designed to contract without consideration, but had in fact contracted on and for a consideration and had also evidenced the agreement by writing under seal, and the consideration failed, then such failure could by proper pleading and proof be established as a defense. This distinction was made to prevent fraud. If one originally contracted not expecting benefit, the seal would hold him conclusively to his agreement. But if he contracted for some consideration of value, and the other party failed to furnish this value, the seal would not be made an instrument for working a fraud and holding him to the contract. However the authorities differ on these points, some holding the seal conclusive in all instances, some holding it *prima facie* only in all instances, and some recognizing the distinctions set out above and holding it conclusive in some and *prima facie* in other cases. On the following points they all agreed: 1. That the seal was at least *prima facie* evidence of consideration in all cases, and that in suing to enforce a sealed contract the consideration need be neither plead nor proved. 2. That if the defense of want or failure of consideration was permissible at all against a sealed instrument, it could not be availed of unless it were specially set up in the defensive pleadings and was proved by the party relying on it.

As to the other class of parol contracts of the common law, that is,

⁸ Pollock on Contracts, 132; Anson on Contracts, 59, 63; Addison on Contracts, sec. 23.

all contracts not embraced in the law merchant and not under seal, whether in writing or simply oral, it is universally held at common law that no presumption of consideration exists, and the person seeking to enforce such a contract or to recover damages for its breach is required to both plead and prove a valid consideration for the undertaking. The simple writing and signature unaccompanied by a seal did not at common law purport a consideration. There is no requirement, however, that the pleading presenting this defense shall be sworn to.⁹

For several years after the adoption of the common law, there were no statutory provisions on any of these questions. The first statute affecting them was the Act of April 5, 1846, which provided that partial failure of consideration could be set up as a defense in suits on written instruments. This act does not discriminate between sealed and unsealed instruments, or between paper of the law merchant and of the common law, nor does it contain anything as to the procedure in such cases.¹⁰ It seems, however, to have been applied only to unsealed instruments, and was held not to require affidavit to the answer.¹¹

The same session of the Legislature passed a general practice act, section 52 of which is as follows: "In any suit founded on any instrument or note in writing, under the seal of the party charged therewith, the defendant may, by special plea, impeach or inquire into the consideration thereof, in the same manner as if such writing had not been sealed, but no pleas impeaching the consideration of any instrument or note in writing, under seal, shall be admitted, unless supported by affidavit of the defendant, or some person for him, stating that the facts set forth in said plea are true, as far as stated of his own knowledge, and that he believes them to be true, as far as stated, from the information of others."¹² This, it will be seen, only reduces any sealed instrument to the level of the same class of instruments had it been unsealed; that is, a sealed contract of the common law would thereafter import consideration only so far as the same instrument would have done theretofore without any seal; a sealed contract of the law merchant would thereafter import consideration to same, but only to the same extent as an unsealed contract of the same sort had theretofore imported it. This statute clearly indicates that in the judgment of the Texas Legislature consideration should thereafter be a necessary element of sealed instruments, and want or failure of consideration should have the same effect as to them as in other written contracts,

⁹ *Williams v. Bailes*, 9 Texas, 61.

¹⁰ Acts of 1846, p. 40; Paschal's Digest, p. 146; 2 Gammel, Laws of Texas, 1346.

¹¹ *Harris v. Cato*, 26 Texas, 338.

¹² 2 Gammel, Laws of Texas, 1681, 1682; Paschal's Digest, p. 148; Acts of 1846, 375.

provided the defense were interposed in the manner provided in the statute. This statute also dealt with the matter of procedure, and required the defendant to impeach the consideration of the instrument by plea under oath.

In the case of *Williams v. Bailes*, arising soon thereafter and before any further legislation on the subject had been passed, it was held that the requirement of an affidavit by the defendant to such plea against such instrument was formal, because the plea did not call for any further evidence by the plaintiff in making out his *prima facie* case than would have been necessary without the plea. That is, that the production of the sealed paper made out a *prima facie* case for the plaintiff and the burden of sustaining his plea was on the defendant.¹³

In *Jones v. Holliday*,¹⁴ it was held that in suits on unsealed written contracts not of the law merchant consideration must be plead and proved. In this case there was an averment in general terms of valuable consideration. This was held insufficient.

In *Short v. Price*,¹⁵ the court considers the effect of a seal as evidence of consideration, and announces that unquestionably in actions at law on such instruments the seal imports consideration, but denies that the doctrine has application in suits in equity for specific performance or other equitable relief, and decides that in such cases the seal does not make out a *prima facie* case of consideration. In such suits consideration must be shown either by recital in the paper or by proof *aliunde*.

The effect of the statute would therefore seem to be, first, to make clear the right of defendants sued upon sealed instruments to raise the issue of want or failure of consideration by sworn plea setting up the facts in those cases in which it might have been considered that such defense was not available; second, that in such cases the defense would be available to same extent that it would under the circumstances of the case had the instrument not been under seal; and third, that the statute did not aid persons relying on seals as evidence of consideration in those actions in which in law or in equity the seal had not been sufficient theretofore.

It must be constantly borne in mind in considering this statute and cases construing it that by its terms it is limited to sealed instruments, and that the rules of practice therein provided did not apply to unsealed contracts, whether written or verbal.

The next statute affecting the question is the Act of July 2, 1858, doing away with the necessity for scrolls or seals in private contracts.

¹³ *Williams v. Bailes*, 9 Texas, 63.

¹⁴ *Jones v. Holliday*, 11 Texas, 413, 1854.

¹⁵ *Short v. Price*, 17 Texas, 399.

Some difficulty was experienced as to its exact meaning in regard to attachments and similar bonds,¹⁶ and it was amended so as to avoid the effect of some of the previous cases,¹⁷ and was put in its present form. It provides that scrolls or seals shall not be necessary in execution of any private contracts or official bonds, except by corporations, and "that every contract in writing thereafter made should be held to import a consideration as fully and in the same manner as sealed instruments had theretofore done."

No amendment of the statute regarding procedure was made at the time the original statute abolishing the use of seals was passed, nor in connection with any of these amendments. Their effect upon the former laws in that regard was left for the courts to decide.

In *Wimbish v. Holt*,¹⁸ decided in 1863, an answer to a suit on a sealed note which imported consideration was filed without verification. Its sufficiency was questioned. It was held that the Act of 1858 abolishing seals did not affect the rules of practice, and that such answer must still be sworn to, notwithstanding the fact that if the note had not been sealed no verification would have been necessary.

In *Life Insurance Co. v. Davidge*,¹⁹ decided in 1879, though the suit had been brought and tried below before the Revised Statutes of 1879 went into effect, suit was brought on a written contract of insurance; no consideration was alleged. The petition was held bad on account of this omission. The court cited 1 Chitty on Pleading, 262; Gould on Pleading, section 27; and *Jones v. Holliday*, 11 Texas, 414. These authorities are directly in point as to the essentials of a declaration at common law or a petition under our practice prior to the Act of 1858, doing away with the distinctions between sealed and unsealed instruments. There is no question that under those authorities a pleading based simply on an unsealed instrument was required to allege consideration and the plaintiff was required to prove it. It is equally clear under them that in pleading a sealed instrument consideration need not be alleged, and no proof of consideration was required beyond the instrument itself. The opinion in the case last cited makes no reference to this statute and its effect on the practice, if any. I have found no other case bearing directly on the subject. In the revision of 1879 the distinction as to the verification of pleas of failure of consideration in suits on different kinds of writings are all abolished, and now the same rules apply as to sealed and unsealed instruments so far as verification is concerned.

¹⁶ *Read v. Levy*, 30 Texas, 738; *Hart v. Kanady*, 33 Texas, 720; *Bernhard v. De Forrest & Co.*, 36 Texas, 518; *Clayton v. Mooring*, 42 Texas, 182.

¹⁷ Acts of 1893, p. 51; Rev. Stats. 1895, arts. 4862, 4863.

¹⁸ *Wimbish v. Holt*, 26 Texas, 674.

¹⁹ *Life Insurance Co. v. Davidge*, 51 Texas, 249.

It seems that we ought to be sufficiently advanced to disregard rules of procedure which are based on the presence or absence of a scroll or seal, and to put all written instruments on the same basis so that a uniform practice may obtain, by which paper of the law merchant and sealed and unsealed written contracts of the common law should be alike entitled to presumption of consideration, and under which the plaintiff shall be relieved from alleging and proving consideration in suits on all written instruments, and the burden shall be on the defendant to plead and prove that the contract signed by him or his authority was without consideration.

Under the present state of the law, however, it is safer to allege consideration in all suits on all common law contracts, and to prove it, at least by the paper sued on if it recites consideration, or by parol testimony if it does not.

Consideration must always be alleged and proved in oral contracts. Recapitulating, the result of the decisions seems to be:

First. In suits on law merchant contracts, it is not necessary to plead consideration, nor to prove it unless the defendant denies it, which denial should be under oath, but failure to except to the answer on that ground will be a waiver of the verification and testimony can be heard and considered under the unverified plea. Even against a verified plea of failure or want of consideration the paper itself makes out a *prima facie* case for the plaintiff, and the defendant must prove his plea.

Second. If the paper is common law contract under seal, consideration need not be plead, and the paper itself imports consideration, and no further proof need be offered by the plaintiff. If the defendant pleads failure or want of consideration in such case, the burden of sustaining his plea by proof is on him. The doctrine as to verification and its absence, announced above, applies here.

Third. If the paper is common law contract not under seal, the statute says it shall import consideration just as if it were sealed, but the decisions have not recognized this rule, and according to them it is still necessary for the plaintiff to aver and prove consideration for the written agreement. If the paper recites a consideration, it will make out a *prima facie* case in its own behalf; if it does not, the plaintiff must offer testimony *aliunde* in support of his case.

Fourth. If the contract is verbal, the plaintiff must always plead and prove the consideration, or he will fail in his case.

Whenever it is necessary to plead consideration it must be done with reasonable certainty and according to the facts.

Mutual Assent.

The fourth element of contract—mutual assent—must always be plead. It is involved in the general idea of contract, and is ordi-

narily covered by the terms agreed, mutually promised, etc., but it must appear in some form of direct averment.

These are the rules governing the ordinary essentials of a contract.

If the agreement be such an one as at common law could only be enforced if in writing, then it must be alleged to be in writing. If, however, at common law the contract would have been good without being in writing, as is the case in all contracts now covered by the statutes of frauds, then the fact of its being written need not be averred notwithstanding the statute now requires it to be in writing. This is a distinction which has long outlived its usefulness and should be abolished, but it has not been, and so the pleader must consult either the ancient common law or the precedents, or both, and govern himself accordingly.²⁰

In addition to the existence of the contract, such matters of description as will reasonably serve to identify it must be plead. These usually consist in the date, parties, place of making, and substance of the contents. So much of the contract as is the basis of the right claimed must be plead. This may be by appropriate statements as to its legal tenor and effect, or by copying the instrument, or those parts involved in the litigation. If it appears from the contract that there are duties resting on the plaintiff, to be performed prior to or concurrently with the defendant's obligation, then performance, or tender of performance, must be averred, for the plaintiff's petition must show every fact essential to the existence of a complete right in him.²¹

When it is stated that all these several matters must appear affirmatively and distinctly in the petition, it is not meant that there must be a separate paragraph or even sentence for each, but only that every one of the facts must be contained in the pleading. The same statement may sometimes cover several points; as in a suit on a note, the allegation of its date, amount, the names of payee and payor, date of maturity, etc., will all be considered both as matter of description in determining the identity of the paper, and as statements of its legal effect and substance. The same is true in a great many other instances that need not be given.

Legal right and duty being correlative terms, the statement of the legal right of the plaintiff necessarily involves the statement of the legal duty of the defendant.

²⁰ James v. Fulcro, 5 Texas, 512; Brock v. Jones, 8 Texas, 78; Adkins v. Watson, 12 Texas, 201; Doggett v. Patterson, 18 Texas, 162; Miller v. Dawson, 20 Texas, 174; Cross v. Everts, 28 Texas, 524; Lewis v. Alexander, 51 Texas, 578; Gonzales v. Chartier, 63 Texas, 36; Robb v. Railway Co., 82 Texas, 392, 18 S. W., 707; Day v. Dalziel, 32 S. W., 377.

²¹ See note, p. 286.

Wrong by Defendant.

The petition is not complete, though, upon the statement of this right and duty, however full and formal it may be, but must go further and show the second element of the cause of action, the violation of this right and the breach of this duty by the defendant.

Sometimes this violation is affirmative and active in its nature; consisting in some wrongful act or acts done or threatened to be done; sometimes it is negative and passive, consisting of an omission or failure to do some acts which it is the legal duty of the defendant to do. Whatever be the nature of the violation, it must be distinctly and specifically averred, not giving the evidence in detail, but stating the facts regarding it as that term has been attempted to be explained.

Legal Wrong.

This violation, whether active or passive, always consists either of some unlawful act or omission, or some act or omission, lawful in itself, but performed or permitted in an unlawful manner, or in a few exceptional cases, not very satisfactorily indicated or explained in the works on substantive law, of a legal act done or omission permitted in a lawful manner, but with an unlawful intent.

The rules of pleading require that the facts constituting this wrong should be distinctly alleged. The allegation must, of course, be according to the case, and must show a violation of the legal obligation existing between the parties. If a right be of one kind, and the wrong complained of be of another, this will not be good. The particularity of statement necessary is regulated in a large degree by the character of the duty violated.

If A is a common carrier of passengers, as a railroad company, and B procures a ticket and lawfully takes passage on one of its cars, the relations between the parties are those of common carrier and passenger, and the law holds the company to the highest practicable degree of care to prevent injury to B. On the same train will be others in the employ of the company, performing the various duties as members of the train crew. The relations between them and the company are those existing between this particular class of masters and servants, and a different and much less degree of care is required by law of the company in behalf of the employe than of the passenger. A wreck occurs during the trip and a passenger and an employe are each injured. In determining their respective rights against the company, and its liability to each, different rules of law would be involved, and the company might very readily be shown to be liable to the passenger, when no liability would exist as to the servant. In bringing suit for the passenger, it would be necessary to allege facts showing only such negligence as

would be a violation of the high degree of care due to him, while in suing for the employe, the facts must show an absence of ordinary care in the discharge of the master's duty. And so in all cases, the facts alleged must show breach of the very legal duty shown by the petition to have been owed by the defendant to the plaintiff.

In all cases in which the act or omission is in itself unlawful this must be made to appear. In those in which the act or omission is lawful in itself, but the manner of doing, or failing to do, was unlawful, this must be shown; and when the gist of the wrong is the improper motive, this must be shown. In most cases of tort, if the wrong is done maliciously, that is, with an affirmative evil intent, or intentionally and with such reckless disregard of consequences as to be equivalent to a specific evil intent, exemplary damages may be recovered in addition to the compensatory or actual damages. In all such cases, to entitle to the exemplary damage, the evil motive, or recklessness, or wantonness must be alleged; and this is so, even in those cases in which the intent has nothing to do with compensatory damages. The particularity with which certain wrongs, as fraud, negligence, etc., must be alleged, have been already discussed.²²

Act or Omission by the Defendant.

A right in the plaintiff and violation of such right, do not of themselves entitle the plaintiff to sue the defendant. It must be a violation by the defendant, or under such circumstances that the law holds him responsible therefor. This may occur in a great many ways, and presents a great many questions both of law and of fact. These may be classed under two general groups or heads: first, facts and law regarding the status of the party complained against; and second, facts and law involved in responsible causation.

Legal Status of the Defendant.

Considering these in their order, we find that there are some persons who are absolutely, and some who are partially, exempt from suit, no matter how damaging their conduct may have been. These have been considered in the chapter on Parties and need not be more than enumerated here. Those absolutely exempt are the direct representatives of the sovereign, namely the Federal government, the State, and natural persons acting strictly as representatives of the sovereign in some official capacity involving discretion. Those exempt in some cases and liable in others are smaller political corporations and persons under legal disability either of law or fact, such as minors, married

²² See chapter on General Principles.

women, insane persons, persons under duress, etc. Different rules apply in determining the immunity from, or liability to, suit by these several parties, according to the character of the case and the nature of the disability. In case of the political corporations immunity from suit is greater in cases of tort than breach of contract. On the other hand, in case of persons under disability the immunity is greater in breach of contract than in tort; the reasons being in the last case that the rights and duties violated in torts are imposed by law without, or even against, the assent of the party and do not require legal capacity to assume them, where as in contract the obligation or duty can only be taken on by the voluntary act of the mind and will of the party sought to be charged with the duty, and therefore incapacity prevents incurring such liability.

Defendant's Connection with the Wrongful Act or Omission.

Responsible causation involves the consideration not only of the nature of the act or omission which is alleged to be the cause of the damage as considered above, but two other matters; first, the connection between the party charged with the wrong and the act or omission charged to have occasioned the damage; and second, the connection between such act or omission and the damage sustained. As to the first of these, the facts must show such connection as makes the party complained against legally responsible for the alleged act or omission. This divides itself into two general questions: first, the liability of the defendant for his own conduct; and second, his liability for the conduct of others. The first presents no special difficulty, and has practically been covered in considering the status of the party complained of. The second presents more numerous and complicated questions. To render one person legally responsible for the conduct of another, there must exist between them some special relation or condition of facts out of which such liability grows. As a general rule of law one person is in no sense responsible for the conduct of another. If, therefore, in any given case it is sought to hold one legally responsible for some act or omission of another, the pleader must show some special conditions existing between them which is a sufficient legal basis for such liability. The most common of these relations are the following: Joint contractors, joint tort feasers, principal and agent, master and servant, employer and independent contractor, partners, husband and wife, parent and child, guardian and ward, trustee and beneficiary. I do not mean to state that this enumeration covers all of the special relations which may render one party legally responsible for the conduct of another, but they include almost, if not quite, all of them, and it may be safely stated that unless the facts show that the act or omission was by the defendant himself, or some one sustaining to him one or more of

the above enumerated relations, that the plaintiff will have difficulty, if indeed he does not fail, in establishing the defendant's liability. On the other hand, it by no means follows that the establishment of these relations will make the defendant liable for every wrong committed by the party sustaining such relation to him; for this is not, and can not be, the law. An act or omission of one person to be the basis of liability by another on account of the representative capacity of the former, must be such an one as comes fairly within the scope of the employment or within the conduct legitimately connected with, and growing out of transaction as to which he stands for the other. There are duties which the law, either common or statutory, positively imposes on some particular person, or class of persons, and requires their discharge by him, or them, and will not permit him, or them, to relieve himself, or themselves, from liability by delegating the performance to another. Failure to discharge such duties always leads to liability, if injury follow. Take for illustration the common carrier and passenger. Here the carrier owes the duty to exercise a high degree of care for the safety and protection of its passengers. This duty is nonassignable. The carrier also owes the duty to carry the passenger over its route, and to do this must employ servants to operate its vehicles, etc. *En route* a conductor in charge of a train violently and unlawfully assaults a passenger in one of the cars and injures him. Here the carrier has violated its nonassignable duty of protection, and its representative has also committed a wrong in his representative capacity for which the company is liable, and the passenger can sue on either or both theories of the case. But suppose the assault was made, not by the conductor, but by a drunken fellow-passenger, under such circumstances that the conductor could have prevented it by using ordinary care. Here the company is liable for a violation of its nonassignable duty to use reasonable care to protect the passenger, and could be held responsible for its own negligence in not making reasonable provision for his safety. In such cases it would be no defense for the company to show, either that it had no conductor on the train, or that he was so busy he could not reasonably prevent the assault, or that he was present and had been instructed specially to prevent the injury and had failed to do so. The failure to perform a nonassignable duty is always to be regarded as a personal failure of the person on whom such duty rests, and the respective rights and duties of the parties in these matters, of course, are determined by the rules of substantive law regarding these several relations, and can not be further discussed here. The rule of pleading is that in each case the pleader must study his case carefully, ascertain certainly the facts which constitute the conduct of the person actually guilty of the wrong, and the special relations between him and the defendant and allege all these clearly and accurately in the petition.

Proximate Cause.

To allege the plaintiff's right, and that the defendant, in person or through some one for whose conduct he is legally responsible, has done some wrongful act, or permitted some improper omission, contemporaneous with, or immediately preceding the damage sustained by the plaintiff, is still not sufficient to fix liability upon him. It must be further shown that the damage was the direct and proximate result of this wrongful conduct, and this must be made to appear affirmatively in the petition. Often, as in some suits for breach of contract, the statement of the failure of duty by the defendant carries with it the idea that damage has resulted directly and proximately from the wrong, and in such cases, of course, no separate averment need be made, but in suits for torts generally and in some cases of breach of contract, the connection between the wrong and the injury is not so apparent, and in such cases there must be a distinct averment of the fact. Stated differently, it is essential that the petition shall show that the injury complained of is the direct and proximate result of the wrong of the defendant. If this appears in the general statement of the case, there is no necessity for a separate averment to that effect; if it does not so appear, then such averment must be made.

In the great majority of cases, if the petition covers the points above indicated, it will be sufficient to fix responsibility upon the defendant. There are, however, a few instances in which, in stating his case, the plaintiff shows such connection between himself and the wrong charged against the defendant as to make out a *prima facie* defense against his case; as in a suit against a defendant for negligence, in which the plaintiff's statement of facts shows a *prima facie* case of contributory negligence on his part. In such cases, and such only, he must set up facts which would destroy this *prima facie* defense against his case.

It is needless to say that the facts constituting the violation of the right and breach of duty vary with each case according to the nature of the right and the conduct of the parties, but whatever the particular facts, the rule holds good that in every case the violation of plaintiff's right must be made to appear distinctly by direct averment, showing defendant's responsibility therefor.

Legal Injury.

The third element in the cause of action is the legal injury to the plaintiff consequent upon the violation of his right by the defendant. This again varies according to the facts and circumstances of each case. The general theory of the common law is to compensate for any violation of right by payment of money as damage. There are exceptions to

this rule, such as suits for specific property, real or personal, but they are rare. In equity, other remedies beside compensation in money are less infrequent, though even here they are not common. For instance, under peculiar conditions equity will require specific performance of a contract, or will grant an injunction against the continuation of an existing wrong, or to prevent a threatened injury. But be the remedy what it may, the facts showing injury and constituting the basis for the court's action in awarding and computing the amount of the damage, or in decreeing some other appropriate relief must always be given. As stated before, in treating of the general principles of pleading, general damages, that is, such damages as not only naturally, but necessarily, result from the wrong complained of, need not be specifically alleged, but may be recovered under general allegations, but in all cases in which special damage is sought, whether it constitute all the damage in the case, or is sued for in connection with the general damages recoverable under the general averments, the facts showing the special damage, and giving the proper standards for its measurement, must be averred. If the case is such an one as entitles the party to some particular relief, such as specific performance, injunction, *mandamus*, etc., the facts entitling to this must be particularly set out, and where the relief is of a kind that is awarded only in equity, and then only if there is no adequate remedy at law, it is held that the statement to this effect is essential, although on principle this would seem to be questionable.

The district and county courts in Texas are authorized to grant any relief to which the party may show himself entitled, whether under the common law it could be afforded by courts of law or equity. That is, the district and county courts in Texas have both common law and equity jurisdiction, and administer the law in those civil cases intrusted to them without reference to the common law distinctions between legal and equitable rights and remedies.

PRAYER FOR RELIEF.

Having laid the basis for so doing, the plaintiff must, in his petition, pray for the relief desired. It is always better to have a prayer for general relief also. The ordinary form is to pray for the particular relief the party desires and thinks himself entitled to, and to follow this by a prayer for such relief, either general or special, as he may be, in law or equity, entitled to receive. The form is immaterial, but the dual prayer, including both the special relief sought and the general relief to which he may show himself entitled, should always be made.

It is customary to pray for citation against all the defendants, naming them, requiring them to appear and answer at the proper term of court. There are authorities in equity which hold that complaining against a

party in the body of the bill without following it by a prayer for process against him does not make him a party defendant, and that only those specifically mentioned in the prayer for process are in fact defendants in the suit. Cases intimating this may be found in the Texas Reports, but there is nothing in the statutes or the rules requiring it, and it is not believed to be essential, although it is desirable.

SIGNATURE.

The petition must be signed by the plaintiff or his attorney, and unless so signed will not be recognized by the court. It is not, however, essential that this signature should appear at the close of the instrument. If it is indorsed on the back of the petition, intending it to be the signature, this would be sufficient, though it would be informal. The party signing the pleading is responsible to the court for its contents.

INDORSEMENT.

The rules are quite specific as to the indorsements to be placed upon original petitions. The requirement is: "Plaintiff's Original Petition," and in cases of trespass to try title there must be the further indorsement: "This action is brought as well to try title as for damages." It is also customary to indorse on the back of the petition the style and number of the cause. The rules give specifically the proper designation of each succeeding pleading filed by either party, and they should be carefully followed as material aids in the orderly conduct of the case.

CHAPTER XIV.

DEFENDANT'S ORIGINAL ANSWER.

The plaintiff having presented his petition to the court, specifying his cause of complaint against the defendant, it is the privilege of the defendant to make known to the court for its consideration any matter constituting a legal or equitable defense to such complaint.

These defensive matters may be of various kinds,—some of them only tend to delay the proceedings, some to defeat the particular suit, and some to permanently defeat the cause of action.

Each of these defenses must be either a denial of some matter of law or fact asserted by the plaintiff, or a confession that the facts as plead by the plaintiff are true, followed by allegations that by reason of some other facts contemporaneous therewith they never constituted a cause of action, or of some other facts occurring subsequently thereto, the cause of action which once existed has been legally discharged and avoided, or the assertion of some matter of estoppel cutting the plaintiff off from any legal advantage from the facts plead by him. Pleadings interposing defenses of the first kind—that is, those denying the law or the facts—are the means by which the defendant joins issue on the facts tendered by the plaintiff; pleadings interposing defenses of the second and third kinds—that is, confessing and avoiding the facts alleged by the plaintiff or of estoppel—are not methods of joining issue with the plaintiff, but are means of tendering to him new issues, by the defendant.

As every pleading tendering an issue, by whatever party presented, necessarily involves matter both of law and fact, so the joinder of issue on every such pleading may be either on the law or on the facts, or on both. This is true without reference to the class of pleading, whether dilatory or in bar, in which the issues are tendered, or the stage of the proceedings at which they are filed.

Issues of law are joined by demurrer to the particular pleading tendering the issue. This demurrer admits, for the time being, the truth of the facts alleged in the pleading demurred to, and asks the judgment of the court as to the law applicable thereto. Issues of fact are joined by either general or special denial of the facts, or in some instances occurring after filing of the original answer to be noted as we progress, they are joined by presumption of law without formal pleading.

**THE STATUTES AND RULES REGARDING PLEADING BY
THE DEFENDANT ARE AS FOLLOWS:**

Statutes.

"The defendant in his answer may plead as many several matters, whether of law or facts, as he shall think necessary for his defense, and which may be pertinent to the cause, provided, that he shall file them all at the same time, and in due order of pleading.

"In all cases in which the citation has been personally served at least ten days before the first day of the term to which it is returnable, exclusive of the day of service and return, the answer of the defendant shall be filed in the county and district courts, on or before the second day of the return term, and before the call of the appearance docket on said second day.

"In all cases in which service of the citation has been made by publication the answer shall be filed on or before appearance day of the term next succeeding that to which such citation is returnable.

"An answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit:

- "1. That the suit is not commenced in the proper county.
- "2. That the plaintiff has not legal capacity to sue.
- "3. That the plaintiff is not entitled to recover in the capacity in which he sues.
- "4. That there is another suit pending in this State between the same parties for the same cause of action.
- "5. That there is a defect of parties, plaintiff or defendant.
- "6. A denial of partnership as alleged in the petition whether the same be on the part of the plaintiff or defendant.
- "7. That the plaintiff or the defendant, alleged in the petition to be duly incorporated, is not duly incorporated as alleged.
- "8. A denial of the execution by himself or by his authority of any instrument in writing, upon which any pleading is founded, in whole or in part, and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed. Where such instrument in writing is charged to have been executed by a person then deceased, the affidavit will be sufficient if it state that the affiant has reason to believe and does believe that such instrument was not executed by the decedent or by his authority.

"9. A plea denying the genuineness of the indorsement or assignment of a written instrument, as required by article 313.

"10. That a written instrument upon which a pleading is founded is without consideration, or that the consideration of the same has failed in whole or in part.

"11. That an account which is the foundation of the plaintiff's action, and supported by an affidavit, is not just, and in such case the answer shall set forth the items and particulars which are unjust.

"12. That the contract sued upon is usurious.

"In every action in which a defendant shall desire to prove any payment, counter-claim or set-off, he shall file with his plea an account stating distinctly the nature of such payment, counter claim or set-off, and the several matters thereof; and on failure to do so he shall not be entitled to prove the same unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof."¹

"The laws of limitation of this State shall not be available to any person in any suit in any of the courts of this State unless it be specially set forth as a defense in his answer."²

"It shall be unlawful for any person, firm, corporation, association or combination of whatsoever kind to enter into any stipulation, contract or agreement by reason whereof, the time in which to sue thereon is limited to a shorter period than two years. And no stipulation, contract, or agreement for any such shorter limitation in which to sue shall ever be valid in this State.

"No stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon shall ever be valid unless such stipulation is reasonable, and any such stipulation fixing the time within which such notice shall be given at a less period than ninety days shall be void, and when any such notice is required, the same shall be given to the nearest or any other convenient local agent of the company requiring the same. In any suit brought under this and the preceding article it shall be presumed that notice has been given, unless the want of notice is specially pleaded under oath."³

"Where the defendant has pleaded the general denial, and the plaintiff shall afterward amend his pleading, it shall not be necessary for the defendant to plead such denial a second time, but such original denial shall be presumed to extend to all matters subsequently set up by the plaintiff.

"Pleas shall be filed in the due order of pleading, and shall be heard and determined in such order under the direction of the court.

"Pleas to the jurisdiction, pleas in abatement, and other dilatory pleas and demurrers, not involving the merits of the case, shall be determined during the term at which they are filed, if the business of the court will permit."⁴

¹ Rev. Stats. 1895, arts. 1262, 1263, 1264, 1265, 1266.

² Rev. Stats. 1895, art. 3371.

³ Rev. Stats. 1895, arts. 3378, 3379.

⁴ Rev. Stats. 1895, arts. 1267, 1268, 1269.

Rules of the Court.

"THE ANSWER.

"6. The answer of defendant shall consist of an original answer, and such other supplemental answers as may be necessary; in the course of pleading by the parties to the suit, to enable the defendant to state all of the exceptions and facts, representing his defense, as contained in his original answer, or his cross action, if one be set up in the original answer, and such other facts as may be required to rebut the facts that may be stated in the original and supplemental petitions, as pleaded by the plaintiff. The original answer and the supplemental answers shall be indorsed, so as to show their respective positions in the process of pleading, as 'original answer,' 'defendant's first supplemental answer,' 'defendant's second supplemental answer,' and so on, to be successively numbered, named and indorsed.

"ORIGINAL ANSWER.

"7. The original answer may consist of pleas to the jurisdiction, in abatement, of privilege, or any other dilatory pleas; of exceptions, general and special, of general denial, and any other facts in defense by way of avoidance or estoppel, the same being pleaded in the due order of pleading, as required by statute; and it may present a cross-action, which to that extent will place defendant in the attitude of a plaintiff. Facts in avoidance and estoppel may be stated together, or in several special pleas, each presenting a distinct defense, and numbered so as to admit of separate issues to be formed on them.

"SUPPLEMENTAL ANSWERS.

"8. The defendant's supplemental answers may contain exceptions, general denial, and allegations of new facts, not before alleged by him, in reply to that which has been alleged by the plaintiff."

"EXCEPTIONS TO PLEADING.

"17. General exceptions shall point out the particular instrument in the pleading, to wit: the original petition or answer, or the respective supplements to either; and in passing upon such general exception every reasonable intendment arising upon the pleading excepted to shall be indulged in favor of its sufficiency.

"18. A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligently the obscurity, inconsistency, duplicity, generality, or other insufficiency in the allegations in the pleading objected to. The general expression that it

is vague, uncertain, and the like, alone shall be regarded as no more than a general exception."

"DILATORY PLEAS, MOTIONS AND EXCEPTIONS, WHICH DO NOT GO TO THE MERITS OF THE CAUSE.

"24. All dilatory pleas, and all motions and exceptions relating to a suit pending, which do not go to the merits of the case, shall be tried at the first term to which the attention of the court shall be called to the same, unless passed by agreement of parties with the consent of the court; and all such pleas and motions shall be called and disposed of before the main issue on the merits is tried."

"MOTIONS AND EXCEPTION TO MERITS.

"25. All motions which go to the merits of the case, and all exceptions, general and special, which relate to the substance or to the form of pleading, shall be decided at the first term of the court, when the case is called in the regular order for trial on the docket, if reached, whether there be an announcement on the facts or not, unless passed by agreement of parties with the consent of the court."

NUMBER OF DEFENSES AND ORDER OF PRESENTING THEM.

The statutes secure to the defendant the right to interpose all the defenses he may have. There are only two restrictions on this right: First, they must be presented at the same time; and second, in due order of pleading.

The rules recognize this right and enumerate the several kinds of defenses and the classes of pleadings by which they may be interposed. They also require that the defenses be presented in due order.

There are two of these rules as to due order which are of universal application. The first is that dilatory pleas must be presented before pleas in bar,⁵ and the second, that in joinder of issues on any pleading, the issues of law must be joined before issues of fact.⁶ The order to be observed among the several kinds of dilatory pleas is not entirely free from difficulty, as there is some disagreement between the common law order and the order in which several pleas are enumerated in the rules. The order of pleas in bar is free from doubt.

⁵ See page — *supra*.

⁶ Moore v. Torrey, 1 Texas, 43; Walling v. Williams, 4 Texas, 427; Watson v. Loop, 12 Texas, 13; Hutchins v. Lockett, 39 Texas, 167.

DISTINCTION BETWEEN DILATORY PLEAS AND PLEAS IN BAR.

It is essential at the outset to distinguish between the two general classes of defenses known as dilatory pleas, on the one hand, and pleas in bar, or, as they are frequently called, peremptory pleas, on the other. The test is a simple one, and ordinarily easy of application, though in a few cases it is a little difficult.

Dilatory pleas embrace all those defenses which only delay or defeat the present suit or action, leaving the cause of action unsettled, so that it may be litigated at some later time. Pleas in bar present matters which not only settle the particular suit in which they are interposed, but go further and settle finally the cause or causes of action involved in the suit and cut off all litigation regarding them in any subsequent suit between the same parties.

DILATORY PLEAS PRECEDE PLEAS IN BAR.

As defenses are to be acted on in the same order in which they are plead, the reason for requiring that the dilatory pleas shall precede those in bar is found in the nature of the pleas themselves. It would, of course, be futile to insist on delaying or defeating a particular suit after hearing on the merits and final adjudication of the rights of the parties in the matter in controversy.⁷ Dilatory pleas must precede pleas in bar, and must be acted on before the pleas in bar are finally adjudged, or they can not be considered by the court. This order is always to be observed.⁸ There is one point here which must be guarded for fear of misapprehension. There are a few matters of such nature as to be available in abatement of the suit at whatever time they may come to the knowledge of the court—whether before, during or after the trial. Failure to present these matters by plea in abatement does not prevent their consideration at subsequent stages of the litigation, nor weaken their force when thus presented. Among these are questions of potential jurisdiction over the subject matter or the person, and in some suits a misjoinder of parties, plaintiff or defendant, and others. These will be discussed more fully as we deal with them separately.

⁷ Hardy v. Broaddus, 35 Texas, 684.

⁸ Crosby v. Huston, 1 Texas, 225; Horton v. Wheeler, 17 Texas, 54; Spencer v. James, 10 Texas Civ. App., 327, 31 S. W., 540; Logan v. Loan Assn., 8 Texas Civ. App., 490, 28 S. W., 141.

DILATORY PLEAS.

Due Order Among Dilatory Pleas.

The order of presenting dilatory pleas at common law is as follows:

1. To jurisdiction of court.
 - (a) Subject matter; (b) Person of defendant.
2. Abatement of suit.
 - (a) Disability of person; first of plaintiff, second of defendant.
 - (b) To the writ.
 - (c) To the petition.

These are enumerated in the rules as follows:

1. Pleas to the jurisdiction.
2. In abatement.
3. Of privilege.
4. Other dilatory pleas.⁹

It is evident that the rules give simply the more general divisions of these dilatory pleas, and contemplate that the more minute classification shall be made according to the accepted order at common law.

In both the common law order and the enumeration in the rules the first defensive matter to be presented is want of jurisdiction of the court to hear the case. This evidently relates to potential jurisdiction, that is, authority conferred by the sovereign to adjudge the matter presented as between the parties sought to be bound by the adjudication. It embraces both jurisdiction of the subject matter and of the person. It is, of course, logical that the court should determine at the outset whether or not it has power to hear the case. The logic of requiring the defendant to advise the court of this lack of jurisdiction over the subject matter, when this is to be decided on the facts presented by the plaintiff's petition, is not so apparent; indeed, no such necessity exists, and it is the recognized duty of the court to stay the proceedings at any stage when this condition shall come to its attention: There can be no waiver of this matter by failing to plead in abatement.

When, however, the lack of jurisdiction relates to the person of the defendant, the question is not so clear, either on principle or by the authorities. At common law, in England, where there are so many and such widely separated classes of persons, each having its peculiar privileges and burdens, and also in the Federal courts,¹⁰ where jurisdiction is often dependent on the citizenship of the different parties to the suit, occasions for interposing this plea are much more frequent than in Texas.

⁹ Rules for District and County Courts, No. 7.

¹⁰ *De Wolfe v. Roland*, 1 Peters, 498; *Torrington v. Pillsbury*, 114 U. S., 138.

It is possible that an occasion to urge it might arise in the courts of this State, but none has done so far, at least there is no such case reported. This lack of potential jurisdiction over the person must be carefully distinguished from the personal privilege of the defendant to be sued in a particular county, which is designated in the rules as "plea of privilege," and will be further considered under that head.

Not only must all dilatory pleas precede pleas in bar, but due order must be observed among the different kinds of dilatory pleas, and a failure to do this will be regarded as a waiver of all those dilatory pleas which, according to the rules of pleading, should have preceded the one filed. To illustrate: A plea of privilege to be sued in the county of one's residence would be a waiver of the right to object to the citation or service. So it is important to have clear ideas and accurate information as to the rules governing these matters.

Pleas in Abatement.

(a) Disability of the Party.

First, of the plaintiff; second, of the defendant.

The most frequent disabilities of the parties in suits by natural persons are coverture, minority, and mental unsoundness; hostile alienage also comes in this class.

The effect of these different conditions on the right to bring suit has already been considered.¹¹

These pleas are only to be made of conditions existing at the time the plea is filed and are to be distinguished from defenses based on similar conditions existing at the time the plaintiff's right or cause of action is charged to have occurred. To illustrate: A sues B on a promissory note. At the date the note was given A was a single woman; since that time she has married. Here A has a good cause of action against B; the fact of her marriage not affecting her substantive rights, but as she is now a married woman, the suit should be brought by her and her husband together. If, however, she sues alone without joining her husband, B would have to plead the marriage in abatement of the suit, and if he did not, he could not avail himself of her disability on the trial.

But suppose the party giving the note was a married woman at the time it was executed, and she is sued on it, her coverture here goes beyond the question of present incapacity to be sued, and includes her incapacity to bind herself by promise at the time the note was given, and is not a matter of abatement but in bar. The same is true as to minority. If a minor makes a contract, and is sued on it after he becomes of age,

¹¹ Chapter VIII, Parties.

he can not plead his former minority in abatement of the suit, for he is now capable of making his defense, and must meet the case on its merits and have the contract avoided because he was not capable of entering into it when it was attempted to be made.

If, however, a minor should commit a tort for which he would be legally responsible and were sued for it during his minority, notwithstanding his liability on the cause of action, he is not regarded in law as capable of properly defending the suit, and so could plead his minority in abatement.

The limitations on rights of foreign corporations to sue have already been discussed. If the petition shows the corporation to be foreign and the transaction one to which the statute applies, and fails to allege compliance with the conditions precedent, the defense will be available by exception. If it makes the allegations and fails to prove them, this will, under recent decisions, be fatal to its suit; so while it is proper and permissible to plead its incapacity in abatement, it now seems not necessary to do so.¹²

To the Writ.

At common law, the original writ was the beginning and foundation of the suit. Here the suit is instituted by petition, and the sole purpose of the writ or citation is to acquire active jurisdiction over the person of the defendant. Strictly speaking, there can be no plea in abatement of the writ in our practice. Objections to the citation or to the return may be made by motion to quash, or by plea denominated a plea in abatement, but the suit, if otherwise properly brought, would never be abated on such ground. If the points were well taken, they would be sustained, and the cause continued to the next term; at which time the defendant would be compelled to answer, as, under the statute, his appearance in filing the motion or plea would subject him fully to the jurisdiction of the court at that time.

To the Petition.

Pleas in abatement of the petition are based on the misjoinder of causes of action, or the nonjoinder or misjoinder of necessary parties plaintiff or defendant. If either of these conditions is apparent from the petition, it should be taken advantage of by plea in abatement. It might be possible in some cases to raise the point by special exception, but this is unsafe and not to be relied on.

It, however, frequently occurs that the grounds of abatement do not appear on the petition. Under these circumstances, if it is desired to

¹² *Taber v. Interstate B. & L. Assn.*, 91 Texas, 92, 40 S. W., 954; *Western Paper Bag Co. v. Johnson*, 38 S. W., 364.

abate the suit, a plea in abatement must be prepared, and it must set out the facts fully and be verified.

Some cases arise in which the plaintiff, though the petition be good, has not correctly set out the case which his testimony will sustain. Here the defendant can safely waive the plea in abatement, and exclude the testimony when it is offered. To illustrate: Suppose a contract is joint between two obligees, and one of them sues alone, declaring on the contract as several. The defendant could join issue on the merits and object to the testimony when offered because of the variance between the pleading and the proof.¹³

Pleas of Personal Privilege.

These are dilatory pleas setting up a privilege by the defendant to have the matters in controversy in the case tried in some other court. They set up matters of venue and not of jurisdiction, and are waived if not plead in advance of pleading to the merits.¹⁴

Certainty in Dilatory Pleas.

The rules as to the certainty and form of all dilatory pleas are very strict. Such pleadings must not only negative all facts giving the right to maintain the suit at the time and place sought by the plaintiff, but must go further, and, tested alone by its own allegations must give to him all the information he may need to enable him to prepare and bring the suit properly if the plea should be sustained.¹⁵ There are a great many different expressions used to indicate the degree of certainty required, but the rule stated above combines the substance of them. It is not necessary in such plea to negative every conceivable state of facts which would give jurisdiction to the court of some suit, but only every state of fact consistent with the cases as stated by the plaintiff, and which might give the court jurisdiction over it.

Thus, if a defendant is sued out of the county of his residence on a contract, he does not have to negative all the twenty or thirty exceptions in the statute on venue which will authorize suing him away from his home, but only such of them as apply to suits on contract. Again, if the suit were on a tort, he would not have to negative the special facts giving venue in suits on contract. The plea must be judged of by the plaintiff's

¹³ *Stachely v. Peirce*, 28 Texas, 328.

¹⁴ See Chapter on Venue, ante, p. 211.

¹⁵ *Breen v. Railroad Co.*, 44 Texas, 304; *Boothe v. Fiest*, 80 Texas, 144; *Cavin v. Hill*, 83 Texas, 76, 18 S. W., 323; *Carothers v. McIlhenny*, 63 Texas, 138; *State v. Goodnight*, 70 Texas, 688, 11 S. W., 119; *Hamm v. Drew*, 83 Texas, 79, 18 S. W., 434.

case, and if it show affirmatively and certainly that the particular case does not come under any of the exceptions, and that as to it he is privileged to be sued in his own county, that will be sufficient.¹⁶

Verification.

As stated in discussing General Principles, the statutes formerly required all pleas in abatement to be verified. This article was omitted from the Revised Statutes of 1879, and article 1265, quoted *supra*, inserted. The first seven classes of pleadings required by it to be verified are dilatory in their nature. The requirement for verification is not universal, but only applies in cases in which the truth of the matter entitling the party to abate the suit is not apparent on the record. Whenever it is apparent of record, the issue may be joined as a matter of law, and the facts are not required to be repeated by the defendant. It is safer to verify all dilatory pleas, whether, strictly speaking, they fall within the enumeration of the present statute or not. The precedents all favor this practice, and it is always desirable to prepare pleadings in such way that no question as to their sufficiency will be raised. I do not mean that it has been definitely settled that it is essential under the present statute to verify dilatory pleas not embraced in it; for the point does not seem to have been raised, and it is possible, though not probable, that it would not be regarded as necessary. For further discussion see Chapter XII, *ante*, Verification.

Enumeration of Matters Which Must be Presented by Pleas in Abatement.

Before passing to the consideration of pleas in bar, we will enumerate some matters which must be set up by pleas in abatement.

Misnomer of a party is one of these, and unless it is so plead advantage can not be taken of the error except in the few cases in which variance between allegation and proof may be insisted on, as in case of written instruments in which the misnomer is descriptive of the instrument.¹⁷

Alienage of plaintiff;¹⁸ defect of parties;¹⁹ incapacity of parties;²⁰

¹⁶ *Tignor v. Toney*, 13 Texas Civ. App., 518, 35 S. W., 881.

¹⁷ *Tryon v. Butler*, 9 Texas, 553.

¹⁸ *Lee v. Salinas*, 15 Texas, 495.

¹⁹ *Holiman v. Rogers*, 6 Texas, 97; *Anderson v. Chandler*, 18 Texas, 438; *Davis v. Willis*, 47 Texas, 162.

²⁰ *Tinnin v. Weatherford*, Dall., 591; *Coles v. Perry*, 7 Texas, 171; *O'Neal v. Tisdale*, 12 Texas, 40; *Lee v. Hamilton*, 12 Texas, 417; *Clifton v. Lilley*, 12 Texas, 134; *Allen v. Pannell*, 51 Texas, 169; *Hemmingway v. Matthews*, 10 Texas, 207; *Cundiff v. Herron*, 33 Texas, 623.

lack of authority to sue in name of county;²¹ objections to the venue of a suit;²² and also claims that the amount in controversy is fraudulently alleged at a greater sum than reasonably could be demanded in order to give jurisdiction to the court, are each of this nature. These are by no means all the various matters which are dilatory in their nature, but will suffice for illustration.

Practice When Plea in Abatement is Filed.

It is a general rule, with very few exceptions, that matters which should be presented by pleas in abatement can not be considered by the court in the absence of such plea; thus, if the plaintiff alleges in his petition facts which will give venue in the county in which the suit is brought, in the absence of such plea he is not required to prove these facts, nor can the defendant disprove them for the purpose of affecting the venue of the suit.²³

But the practice is very different when such pleas are filed. As illustrative of this difference we cite some cases on the question of venue.

In the early case of *Robertson v. Ephraim*,²⁴ in an opinion by Chief Justice Hemphill, the court says: "The petition stated the defendant to be a resident of Lavaca County. This gave jurisdiction to the court in that county. The plea averred residence in Harris County. The presumption from the petition was that the court had jurisdiction. This presumption could be rebutted by allegation and proof; and the defendant having alleged a sufficient cause to impeach the jurisdiction was, it was believed, under the rules of evidence, bound to prove it. We have been referred to no previous decisions of this court on this subject, nor in fact to any other authority; but there seems to be much reason in holding the burden of proof must be on the defendant, who alleges facts which negative the jurisdiction."

It would be difficult to state more plainly that the defendant must establish by evidence the truth of the matters set up by him in his plea of abatement. The venue in this case was fixed by the residence of the defendant, which ordinarily is not in issue and need not be proved by the plaintiff, and not by an issuable fact in the case, such as fraud or a trespass or a crime committed in the county.

And, while neither the opinion nor its reasoning take into account any

²¹ *Smith v. Wingate*, 61 Texas, 56.

²² *Russell v. Railway Co.*, 68 Texas, 650, 5 S. W., 686; *Miller v. Rusk*, 17 Texas, 171; *Compton v. Stage Co.*, 25 Texas Supp., 77; *Blum v. Strong*, 71 Texas, 323, 6 S. W., 167; *Railway Co. v. Mangum*, 68 Texas, 342.

²³ *Wilson v. Adams*, 15 Texas, 323.

²⁴ *Robertson v. Ephraim*, 18 Texas, 124.

difference between pleas based on these different matters, still the decision is not direct authority except in cases where venue is sought to be fixed by residence of the defendant.

In *Graves v. Bank*,²⁵ a suit begun in a justice court, the same question that was decided in above case was presented. The plea suggested that the defendants lived in a different justice precinct from that in which the suit was brought. No evidence was offered on the question of residence, and judgment on the merits was rendered against the defendants. In its decision the Supreme Court uses this language:—"In disposing of this assignment it would probably be sufficient to say that it does not appear that any evidence was offered to sustain the plea of privilege. The mere averment of facts without proof of them is insufficient to found judgment upon."

In *Hopson v. Caswell*,²⁶ the question of practice arose in this way: The plaintiff sued in Smith County, alleging that the defendant's residence was unknown to him at the time of the institution of the suit. The defendant plead in abatement that when the suit was brought he resided in Travis County, and the plaintiff knew this fact when he brought the suit. Evidence as to the fact of the defendant's residence being in Travis County when the suit was brought was offered by him, but no testimony was introduced to show that the plaintiff knew this fact. The plaintiff testified that he did not know where the defendant resided when the suit was brought. Discussing the matter Judge Finley, after stating the issues raised by the plea, says: "It is not enough that the alleged ground of jurisdiction is denied by the plea in abatement; the plea must be followed up and sustained by proof, or it will be unavailing. The burden of sustaining the plea was on the defendant. The evidence must have shown that the jurisdictional ground relied upon did not exist." After commenting on a number of cases, he continues: "In that case (*Kutman v. Page*, 3 Court of Appeals, Willson, 164) the court said that it was not aware that it had been decided whether a plea in abatement proved itself, but expressed the opinion that it only established *prima facie* the facts stated in the plea. We are of opinion that it only raised the issue, and that it required proof to sustain it. The cases of *Robertson v. Ephriam*, 18 Texas, 124, and *Graves v. Bank*, 77 Texas, 585, sustain this contention. See also 1 Encyclopedia of Pleading and Practice, 32, where it is said, 'the burden of sustaining the plea rests on the defendant.'"

These cases would seem to settle the practice that the burden of proof is on the defendant to sustain his plea in abatement when the fact relied on to fix venue relates to the defendant's residence or the plaintiff's knowledge of it.

²⁵ 77 Texas, 555, 14 S. W., 163.

²⁶ *Hopson v. Caswell*, 13 Texas Civ. App., 492.

In *Blum v. Strong*,²⁷ suit had been brought in the district court of Galveston County by Leon & H. Blum against Strong, and attachment had been issued from that court and sent to McClellan County and there levied by the constable on property belonging to Strong. Strong sued the constable in McClellan County and joined the Blums as co-defendants, their residence then being in Galveston County. To fix venue against them the plaintiff averred that they participated in the unlawful and oppressive levy in McClellan County. The Blums plead in abatement their privilege of being sued in Galveston County, and denied any wrong on the part of the constable and any participation therein by them. They, however, did not allege that these charges against them were fraudulently made in order to give jurisdiction. In the original opinion the Supreme Court held that such allegations were essential, and that the issue of "Jurisdiction" as it was called could not be raised without such averments. Motion for rehearing was made and the court set aside the former decision and held that the plea of privilege was not properly before the court, as it did not affirmatively appear from the record that it had been called to the attention of the district court before the trial on the merits.

In *Hilliard v. Wilson*,²⁸ the question of fraud on the part of the plaintiff in alleging local wrongs against nonresident defendants in order to fix venue came up directly for decision. The court held that the plea need not aver that such allegations were fraudulently made, but that "the right to maintain a suit in a county other than that in which the statute fixes venue must depend on the existence of the fact or facts which constitute an exception to the statute and not upon the mere averment of such facts. Where the jurisdiction of the person of a defendant is claimed under some exception of the general statute of venue, and he pleads the privilege of being sued in the county of his domicile as provided by that statute to defeat this plea and deprive him of that right, we think the facts relied on should not only be alleged but proved."

As the plaintiff is the one seeking to sustain the venue, he is clearly the one interested in proving the exception, and hence this decision puts the burden of proof on him. The language used in this case and those cited above is certainly contradictory. The latter case might possibly be reconciled with *Robertson against Ephriam*, and with *Graves against Bank*, on the theory that in the two last named cases venue was fixed by the alleged residence of the defendant, which is not ordinarily an issuable fact and consequently not one as to which the plaintiff would primarily be required to offer proof, while, in it, the averments upon which the plaintiff relied to give venue, were of matters which would

²⁷ *Blum v. Strong*, 71 Texas, 321, 6 S. W., 167.

²⁸ *Hilliard v. Wilson*, 76 Texas, 180, 13 S. W., 25.

be put in issue by the general denial of the defendant, and on which consequently, the plaintiff would be required to offer proof, in the absence of objection to the venue; but this theory does not seem equally applicable to the case of Hopson against Caswell. In that case the defendant was sued in a county in which he did not reside and venue was sought to be fixed by the averment that the place of his residence was unknown to the plaintiff at the time the suit was brought, and testimony was offered on this issue by both parties, and it was distinctly held that the burden of proof was on the defendant.

The better doctrine seems to be, that when the plaintiff by his petition makes out a *prima facie* case of venue in the court in which the suit is brought, to entitle the defendant to abate the suit on the ground of improper venue, he should be required to both plead and prove the necessary facts, and unless he does so the suit should be tried upon its merits.

On the other hand, the defendant's right to abate the suit ought not to be limited to cases in which the allegations by the plaintiff, showing venue, are made fraudulently. The burden of pleading and proving facts sufficient to abate the suit, when the plaintiff's petition is on its face sufficient to give venue, should be on the defendant, but when he has met this requirement, the good faith of the plaintiff should not defeat his right.

PLEAS IN BAR.

Due Order of Pleas in Bar.

The regular order here is:

1. General demurrers.
2. Special demurrers.
3. General denials.
4. Special denials.
5. Pleas in confession and avoidance.
6. Estoppel.
7. Cross action.

Numbers 1 and 2 are methods of joining issues of law; numbers 3 and 4 are methods of joining issues of fact; numbers 5, 6 and 7 set up new matters, and tender issues to the plaintiff.

Demurrers.

A demurrer at common law is not classed as a plea at all, but a reason given for not pleading. This is a result of the restricted meaning

of the term plea in that system, that is, a pleading presenting new facts. It is of little moment with us whether it be classed as a plea or not. It is a matter of defense interposed in the defendant's answer in bar of the plaintiff's suit, or some designated devisable portion of it, and a favorable decision and a final judgment on the issues thus raised is just as effective as a plea of *res adjudicata*, as a judgment on a full hearing on the merits would be.²⁹ It is true that few final judgments of this sort are taken, for under the liberal rules as to amendments the plaintiff usually takes leave to amend, and makes his petition conform to the ruling of the court; but this is a privilege merely and not compulsory, and if he does not file an amendment the decision against him on the demurrer is just as effective to settle the matters embraced therein as any other that could be rendered.

At early common law, if the defendant demurred, and the case was tried on that, there was no right to amend by the plaintiff, nor to plead over on the facts by the defendant. If the demurrer was sustained, judgment final went for the defendant on the whole case. If it was overruled, the demurrer was considered an absolute admission of the truth of the facts demurred to, and the judgment was rendered against the defendant without further trial. This is not so here. If the demurrer is sustained, the plaintiff if he desires has leave to amend and conform his pleading to the ruling of the court; if the demurrer is overruled, the plaintiff must still make out his case by proof, and the defendant can interpose every objection on the facts as to their admissibility, truth, and legal effect, that he could if he had not demurred.

A general demurrer is a suggestion to the court that the facts stated in the pleading demurred to, if true, do not entitle the pleader to any relief from the court. This does not raise any question as to the manner and form of pleading, but only as to its substance, and if upon a fair, reasonable construction, giving to all ambiguities the reasonable interpretation most favorable to the pleading, there appear in it sufficient facts to show a legal right in the pleader, the general demurrer should be overruled.³⁰

A special demurrer,—or special exception, which is but a different name for the same thing—is a suggestion that the matters contained in the pleading, in the manner and form therein set out, are not legally sufficient to entitle the party to the action asked of the court, specifying the defects in form. This always calls in question not only the legal sufficiency of the substance of the pleading, but also the form in which

²⁹ Bomar v. Parker, 68 Texas, 435.

³⁰ Zacharie v. Bryan, 2 Texas, 274; Lambeth v. Turner, 1 Texas, 364; Holman v. Criswell, 13 Texas, 38; Williams v. Warnell, 28 Texas, 611; Mayfield v. Averitt, 11 Texas, 140; Junction City School Incorporation v. Trustees, 81 Texas, 152.

it is presented. Hence, it is said that a special demurrer always includes a general demurrer; or that a general demurrer only joins issue as to the substance of the pleading demurred to, but a special demurrer joins issue both as to the substance and form, and as to the latter it must point out the defects.³¹

The rules of construction applied to a pleading, in considering a special demurrer, are different from those applied under a general demurrer, and that reasonable meaning which is most favorable to the demurrer is placed on it. As under our system the plaintiff may tender many issues, it may occur that some of these may be subject to demurrer and others not. Hence we have in our practice the privilege of interposing general demurrers to designated portions of the petition. If such demurrer is sustained, it eliminates from the petition such parts of it as may be insufficient. If there remains enough in the pleading to properly present one or more causes of action, the case will proceed to trial on them. When the facts stated by the plaintiff show the cause of action sued on to be barred by any of the numerous statutes of limitation, this, owing to our statute, can not be availed of on a general demurrer, and hence the defendant, if he wishes the benefit of the defense on the issues of law must especially except to the petition setting up and making the defense of limitation. This he can do.³²

General Denials.

The plaintiff is required to state every fact essential to his cause of action in order to show the court that he is entitled to relief. If any one of such essential facts be untrue he is not entitled to recover. When the petition is good, it would of course be fatal to the defendant's interests to rely entirely on a demurrer, and it becomes necessary to join issue on the facts; that is, to file some pleading which denies the truth of the plaintiff's pleading and requires him to establish his case by proof. This is ordinarily done by a general denial. There are a few facts which can not be disputed in this way. They are those enumerated in the statutes requiring certain defensive pleadings to be sworn to and have already been somewhat considered, and they will be taken up again in concluding portions of this chapter. With these exceptions, issue is joined upon every material fact asserted by the plaintiff by a general denial. The first effect of such plea is to put the plaintiff upon proof of every fact essential to his case. The evidence must cover

³¹ *Loggins v. Buck*, 33 Texas, 113; *Hendrix v. Nunn*, 46 Texas, 146; *Burleson v. Hancock*, 28 Texas, 82.

³² Rev. Stats. 1895, art. 3371; *Swenson v. Walker*, 3 Texas, 93; *Alston v. Richardson*, 51 Texas, 1; *Rucker v. Daily*, 66 Texas, 284.

every fact which is necessary to make out the plaintiff's case, for it is only facts that are both plead and proven that can be considered by the court in determining the case. All, however, that is required of the plaintiff to meet such pleading is to introduce testimony making out a *prima facie* case. He does not under it have to anticipate any defense which admits such case, but avoids it by proof of other facts.³³

The next inquiry is, what evidence can the defendant give under a general denial? The answer is, all testimony which goes to disprove or rebut that a *prima facie* case in the plaintiff's behalf ever existed. Under this plea, testimony in confession and avoidance, that is, which admits that the plaintiff once had a cause of action, but that it has been defeated or avoided by other matters, can not be heard. It is sometimes difficult to get a clear conception of the difference between matter in rebuttal and in avoidance. The first includes everything which tends to prove that there never was a *prima facie* cause of action in the plaintiff; the latter all testimony which admits the existence at some time of a *prima facie* case, but denies its present existence because of some independent fact or facts which destroy it. Let us illustrate with a case of parol contract. The plaintiff sues upon a parol contract, according to the terms of which certain things are to be done by him before his right thereunder should accrue. The defendant interposes simply a general denial. Here the plaintiff is required to prove every fact going to show a valid contract and the performance by him of all its conditions which were precedent or concurrent with the vesting of his right, and the defendant may introduce any evidence to show that no such contract was ever entered into, or that the plaintiff has not complied with the conditions precedent or concurrent upon his part, for such testimony would not be or involve an admission that there had ever been any liability upon the defendant's part actual or *prima facie*, but under the general denial the defendant could not prove that he had paid the amount due under the contract, for this would confess a liability existing against him at one time and seek to avoid it by proof of its subsequent discharge; nor could he offer evidence to prove that the contract had been procured by fraud, for a fraudulent contract is not absolutely void, but voidable only at the instance of the person defrauded, and the defense of fraud therefore admits a *prima facie* case in the plaintiff and seeks to destroy it.

To illustrate further by a case of tort: The plaintiff sues for the conversion of personal property by the defendant. The defendant pleads general denial. Here the plaintiff must prove every fact necessary to show his right as against the defendant, and the violation of this right by the defendant as alleged in the petition and the injury resulting therefrom, and unless he does this he does not make out a *prima*

³³ Mims v. Mitchell, 1 Texas, 443; Guess v. Lubbock, 5 Texas, 535; Altgelt v. Emilienburg, 64 Texas, 150; Willis v. Hudson, 63 Texas, 678.

facie case; and likewise the defendant can, under his general denial, controvert and disprove each and every fact alleged by the plaintiff to be true. That is, he can show by any competent testimony that the plaintiff did not own the property, and that the defendant was not guilty of its conversion. These or any other facts which constitute a part of plaintiff's cause of action the defendant could disprove, and in so doing would show that he never had at any time been liable to the plaintiff on the matters sued upon; but under such plea he could not prove that he had had a settlement with plaintiff and paid him the agreed amount in discharge of his liability, nor could he avail himself of limitation, nor any other defense which admitted that he once was liable to the plaintiff but was now discharged.³⁴

Care must be taken to distinguish between the general denial in our practice and the general issue at common law, for the general issue is much broader in its effects, and frequently under it matter which really confessed and avoided the cause of action was admissible, while this is never the case in our practice.

Special Denials.

Ordinarily a special denial adds nothing to the force of a general denial. That is, if the defendant has denied generally all the material allegations in the plaintiff's petition, he ordinarily adds nothing to his defense by selecting one or more of the facts essential to the plaintiff's case and denying them particularly. This does not require any more proof by the plaintiff, nor relieve the defendant from any burden resting upon him. There are, however, several issues which the statute provides can not be joined by a general denial, but only by special denial, duly verified, and when the case involves one of these the general denial without a special denial will not put the plaintiff on proof of such allegations, and in every instance except denial of consideration of written contract, the plea must be verified. So the rule may be stated thus, that in order to join issue on any of the matters embraced in sections 8, 9, and 11 under article 1265, or under article 3379, *supra*, there must be a special denial, which must be under oath in all instances except failure or absence of consideration. Sections 10 and 12, article 1265, relate to matters in confession of plaintiff's *prima facie* case and its avoidance by independent facts, and are not here under consideration.³⁵

³⁴ *Mims v. Mitchell*, 1 Texas, 443; *Scarbrough v. Alcorn*, 74 Texas, 360; *Glascoek v. Hamilton*, 62 Texas, 149; *T. B. Ins. Co. v. Hutchins*, 53 Texas, 61; *Willis v. Hudson*, 63 Texas, 678; *Moore v. Hazlewood*, 67 Texas, 624.

³⁵ For distinction between verification in failure of consideration and other of these defenses, see chapter XII, *ante*.

In addition to the cases given above, there are others in which special denials may sometimes be used profitably. The first is in connection with the general denial, in cases in which the pleader desires to emphasize some points in the case upon which he thinks his adversary's testimony will be especially weak or his own especially strong, and to fix these points in the minds of the judge and jury as the controlling facts in the case. The second is cases in which the defendant does not desire to dispute many of the facts alleged by the plaintiff, but agrees with him that these are true, yet differs as to one or two particular facts which will control the case. In such instances it is frequently proper to limit the denials in the defendant's answer to the particular matters which he proposes to controvert, and to especially deny these and afterwards sets out his version of the matter as to these particular points in controversy. Often the scope of the testimony can be very much limited by this process, and the investigation narrowed down to one or two points which always tends to simplify the case and keep down the costs of the litigation.

Pleas in Confession and Avoidance.

Next in due order of presenting the defensive matters come pleas in confession and avoidance. These, as the term implies, are based upon the idea that the whole or some particular portion of the plaintiff's allegations are true, but on account of some other facts no liability really rests upon the defendant by reason thereof. Such a pleading is not a joinder of issue, but sets up new matter upon which issue may be joined by the other side. It is immaterial what the particular nature of this matter may be, for every defense which in legal effect admits that the plaintiff once had a *prima facie* case, and which seeks to avoid or destroy such *prima facie* case by independent facts transpiring prior to, concurrently with, or subsequently to, the facts constituting the plaintiff's cause of action, must be presented to the court in this way, or no testimony can properly be heard or considered in its support.³⁶

In pleas of this kind at common law, the pleader was required to admit the facts absolutely and then to avoid the effect of this admission by the independent facts alleged. This is the better form for pleading under our practice, but it can scarcely be said to be definitely established as a rule, for it is not infrequently the case with us that pleas in

³⁶ See cases in note —, *supra*; also *Railway Co. v. Sheider*, 88 Texas, 153; *Horton v. Crawford*, 10 Texas, 382; *Flanagan v. Pearson*, 42 Texas, 1; *Smith v. Fly*, 24 Texas, 345; *Phillipowsky v. Spencer*, 63 Texas, 604; *Hays v. Bonner*, 14 Texas, 629; *Moore v. Hazlewood*, 67 Texas, 624; *McCamant v. Batsell*, 59 Texas, 363; *Fowler v. Willis*, 4 Texas, 48; *Hamilton-Brown Shoe Co. v. Mayo*, 8 Texas Civ. App., 164.

confession and avoidance will be introduced by a denial of the facts, which is followed by the statement that if the court shall nevertheless find the facts denied to be as contended by the plaintiff, still the defendant would not be liable because of the existence of the facts which are relied upon in avoidance. This, however, is not the best form.

Great care should be exercised in setting out the facts in avoidance, for as this is the introduction of new matter into the case every fact must be stated which it is desired to prove. Fullness is as essential here as in the plaintiff's petition.

It has been frequently decided under our statute permitting the defendant to make different defenses that a plea in confession and avoidance, even though under the old common law form of an absolute admission, does not limit the effect of a general or special denial preceding it in the answer, and that the plaintiff must be prepared to overcome the general denial by proof independent of the admission contained in the confession and avoidance. To hold otherwise would be to deny to the defendant the practical advantage of the statute.³⁷

The most frequent instances of this plea in suits on contract are pleas of payment or other discharge of contracts once binding on the party, of fraud, of duress, of want or failure of consideration, of limitation, of incapacity of parties, of breach of conditions subsequent, of usury, and in suits on torts, pleas of satisfaction, of contributory negligence, of the existence of special relations between the parties justifying the defendant's conduct, and of limitation. Want or failure of consideration and usury are required by the statute, article 1265, to be verified.

It is not necessary to consider each of these several defenses separately, but the pleader should be very careful to embody in his answer every fact legally essential to the one interposed. To illustrate: in setting up fraud it is not sufficient to charge that the contract sued upon by the plaintiff was secured unlawfully and fraudulently, but the very facts constituting the fraud must be plead with such particularity and detail as to enable the court to determine from the pleading that all the elements of fraud were present in the transaction; this is certainly true when a special exception is interposed, and the great weight of authority holds it to be true in cases where the point is raised by general exception or even by objection to testimony. The same principles apply as to each of the other defenses which are required to be plead in this way.

Defense of Limitation.

Pleas of the statute of limitation require some special treatment. These are special pleas in the nature of confession and avoidance. They

³⁷ *Duncan v. Magette*, 25 Texas, 245.

say, notwithstanding, the plaintiff may once have had a cause of action on the matter sued on, his rights have been lost by lapse of time, coupled with the other necessary facts, if any be required in the particular case. This defense can never be considered by the court unless it is specially plead by the defendant.³⁸

Where the facts entitling the defendant to the protection of the statute appear on the plaintiff's petition, it may be interposed by special demurrer setting it up;³⁹ when the facts do not so appear, the defendant must set them up specifically in his answer. In doing this he must be very careful to aver every fact entitling him to the bar of the statute. The extreme certainty required in a plea in abatement is not necessary, still he must clearly and fully present the facts relied on and claim the benefit of the particular statute or statutes applicable thereto.⁴⁰

If the defendant pleads facts entitling him to the benefit of the statute and the plaintiff desires to avoid the bar of his rights by proof of facts constituting disability on his part or other reasons why the statute has not run against him, he must specially plead these matters in avoidance by a supplemental petition, unless they fully appear in his former pleadings.⁴¹

It is not sufficient for the plaintiff's pleadings to show that he or she was under disability at the time the action was begun, but it must appear that the disability existed at such time and under such circumstances as to prevent the bar before suit was brought.

Pleas of Estoppel.

Closely related to confession and avoidance are defenses based upon estoppel. Such defenses are contentions by the defendant that the plaintiff by his own conduct, or that of some one under whom he holds, is cut off from inquiring into and asserting the real facts with reference to the matter before the court, and must submit to have his legal rights determined upon a basis of fact, which by the words or conduct of himself or of those under whom he claims, the defendant has been reasonably lead to believe to be true.

Such a plea does not admit the truth of the plaintiff's contention, but only says that, whatever the real truth may be, the plaintiff or some one

³⁸ Rev. Stats. 1895, art. 3371.

³⁹ *Coles v. Kelsey*, 2 Texas, 554; *Lewis v. Alexander*, 51 Texas, 578; *Gathright v. Wheat*, 70 Texas, 742, 9 S. W., 76; *Water Co. v. Dillard*, 9 Texas Civ. App., 667, 29 S. W., 662; *Rucker v. Bailey*, 66 Texas, 287, 1 S. W., 316.

⁴⁰ *Duggan v. Cole*, 2 Texas, 381; *Cunningham v. Frandtzen*, 26 Texas, 34; *Railway Co. v. Gay*, 88 Texas, 116; *Gillis v. Rosenheimer*, 64 Texas, 243; *Hendricks v. Sneideker*, 30 Texas, 297.

⁴¹ *Harvey v. Cummings*, 68 Texas, 599; *Lewis v. Terrell*, 7 Texas Civ. App., 314.

for whose conduct he is legally responsible has induced the defendant to believe the matters set out in the plea to be true, and has influenced him by such belief to act in such a way as to injure defendant, if the plaintiff should now be permitted to show the plea to be false, and that therefore in determining their respective rights such facts must be conclusively taken to be true.

It is apparent that such a plea is a tender of new issues. This defense was formerly looked upon with great disfavor, but this opposition has very much decreased in later years. Defenses of this kind are required to be plead fully and specifically, charging by direct averment every fact necessary to constitute the estoppel relied upon.⁴²

CROSS-ACTION.

The preceding heads cover the matters which, strictly speaking, are defensive, and if the transactions between men were single the defendant need never go beyond them in setting out the case. Very frequently, however, the business affairs between the same persons cover numerous transactions more or less connected with each other, and many times there are transactions between the same persons entirely disconnected and having no reference or relation whatever to each other. In cases of these kinds it becomes necessary for the defendant in setting out his case to go further than matters of denial, confession and avoidance, and estoppel of the plaintiff's case, and bring before the court such other transactions or matters as ought to be considered by it in determining the relative rights and duties of the parties.

These complications of business affairs are not peculiar to any one place or time, but exist in all civilized and commercial communities, and every system of jurisprudence must recognize and make provision for them according to the special circumstances and to the judgment and wisdom of the particular law-makers. The civil law dealt with them under the heads of compensation and reconvention; the common law uses the terms discount and set-off; and equity uses the common law terms, and also cross-action and counterclaim. Each of these in their several systems has different shades of meaning, and while not always used with accuracy, the general significance of the terms is fairly kept in mind.

Our Texas system is here, as in so many other respects, an adaptation and combination of the common and civil law ideas. As early as 1840 the Congress of the Republic passed a law in the following language:

⁴² *Banking Co. v. Hutchins*, 53 Texas, 68; *Scarborough v. Alcorn*, 74 Texas, 360, 12 S. W., 72; *Burleson v. Burleson*, 28 Texas, 416; *Mayer v. Ramsey*, 46 Texas, 375; *Peters v. Clements*, 52 Texas, 143.

"AN ACT

"ALLOWING DISCOUNTS AND SET-OFFS.

"Sec. 1. Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, that when any suit shall be commenced and prosecuted, in any court within this Republic, for any debt due by judgment, bond, bill, or otherwise, the defendant shall have liberty, upon trial thereof, to make all the discounts he can against such debt; and upon proof thereof, the same shall be allowed in court.

"Sec. 2. Be it further enacted, That in every action in which a defendant shall desire to prove any payment or set-off, he shall file, with his plea, an account, stating distinctly the nature of such payment or set-off, and the several items thereof; and on failure to do so, he shall not be entitled to prove before the jury such payment or set-off, unless the same be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof.

"Sec. 3. Be it further enacted, That no defendant shall be allowed to set-off any discount or demand against the plaintiff's cause of action, which he may have become entitled to, or procured, after suit instituted, so as to defeat the action, and deprive the plaintiff of his costs of suit; provided, that the defendant can, in every case, plead any legal discounts or set-offs which he may have up to the time of making his defense according to the rules of pleading; but the court shall, in all cases, when it appears that the defendant's discounts or set-offs were obtained after the institution of suit, give judgment for the amount which is proved to be actually due the plaintiff (if any there be), together with the costs of suit expended in that behalf.

"Sec. 4. Be it further enacted, That whenever any plaintiff may institute his suit for, and establish a demand in any court having jurisdiction of the same, and his claim be reduced by set-off, to an amount not within the jurisdiction of the court, judgment shall still be given for the amount due the plaintiff, and for costs of suit; should the set-off of the defendant exceed the amount established by the plaintiff, then judgment shall be given in favor of the defendant for the amount that his claim may exceed that of the plaintiff, but the plaintiff shall recover the costs of the suit; but should the claim of the plaintiff be reduced to a sum not within the jurisdiction of the court, by payment, then judgment shall be given in favor of the plaintiff for the balance due; but the defendant shall recover the costs of the suit; and when the defendant may have a claim against the plaintiff, similar in its nature (but they need not be of the same degree) to that of the plaintiff, he shall be permitted to file in his answer a plea of reconvention, setting forth the amount due him, and judgment shall be given in favor of that party who may establish the largest claim, for the excess of his claim over that of his opponent, and for costs.

"Sec. 5. Be it further enacted, That if the plaintiff's cause of action be brought on a claim for unliquidated or uncertain damages, founded on a tort or breach of covenant, the defendant shall not be permitted to set off or discount any debt due him by the plaintiff; and if the suit be founded on a certain demand, the defendant shall not be permitted to set off unliquidated or uncertain damages, founded on a tort or breach of covenant, on the part of the plaintiff."

This act used both common law and civil law terms. Its provisions are not entirely consistent, and the courts encountered some difficulty in placing upon it the proper construction. It remained, however, unamended until April 17, 1860, when the amendment of section 4, passed earlier in the year, took effect. This made no change in the theory of the law, but only regulated costs under some conditions.

No other action by the Legislature was taken until the revision of the statute in 1879, when the present act was adopted. It is in these words:

"Article 750. Whenever any suit shall be brought for the recovery of any debt due by judgment, bond, bill, or otherwise, the defendant shall be permitted to plead therein any counterclaim which he may have against the plaintiff, subject to such limitations as may be prescribed by law.

"Art. 751. The plea setting up such counterclaims shall state distinctly the nature and the several items thereof, and shall conform to the ordinary rules of pleading.

"Art. 752. On the trial of such issue, if the defendant shall establish a demand against the plaintiff exceeding that established against him by the plaintiff, the court shall render judgment for the defendant for such excess.

"Art. 753. Whenever a counterclaim is pleaded under the provisions of this chapter, the party in whose favor final judgment is rendered shall also recover his costs, unless it should be made to appear on the trial that the counterclaim of the defendant was acquired after the commencement of the suit, in which case, if the plaintiff establishes a cause of action existing at the commencement of the suit, he shall recover his costs.

"Art. 754. If the plaintiff's cause of action be a claim for unliquidated or uncertain damages, founded on a tort or breach of covenant, the defendant will not be permitted to set off any debt due him by the plaintiff; and if the suit be founded on a certain demand, the defendant shall not be permitted to set off unliquidated or uncertain damages founded on a tort or breach of covenant on the part of the plaintiff.

"Art. 755. Nothing in the preceding article shall be so construed as to prohibit the defendant from pleading in set-off any counterclaim founded on a cause of action arising out of, or incident to, or connected with, the plaintiff's cause of action."

As suggested above, our statutes employ both common law and civil

law terms, and there is a lack of technical precision in their use which in a great measure accounts for the uncertainty in the law on this subject. We will not attempt to trace the different meanings given to these terms, but will seek to present the controlling doctrines without reference to technicalities.

First it should be observed that the right to set off one claim against another was recognized by the Spanish civil law prior to any Texas legislation on this subject, and the statutes may therefore be considered rather as a regulation of pre-existing rights than the creation of new ones.⁴³

Again it must be borne in mind that these statutes do not in terms apply to all cases of cross action, but only to those in which both demands—that by the plaintiff and that by the defendant—are for obligations *in personam*. Cases in which the right or rights asserted are *in rem* are not within the language of the statutes, though they are affected by them by analogy.

Claims Embraced in the Statutes.

We will consider first the cases which come strictly within the statutes, and later those in the other class.

Claims *in personam*—that is, demands for money, which may be presented to the court for consideration in opposition to each other in the same case—may be divided into five groups:

First. Those which the law applies to each other upon the accrual of the several claims, and which without any agreement of the parties mutually cancel and destroy each other to the extent of the smaller.

Second. Those which have no connection in themselves or by operation of law, but which are applied to each other by mutual agreement of the parties. In these cases the application of the claims to each other and the discharge of the smaller and credit *pro tanto* on the larger takes place at the time fixed by the agreement.

Third. Those entirely disconnected in themselves but which are of the same kind, and on this account may be applied to each other by the court at the instance of either party to the suit.

Fourth. Those not of the same kind, and hence not capable of being considered together under the rules applicable to the third group, but which nevertheless are so connected in origin or nature that they may be applied one to the other by the court in the progress of the trial.

Fifth. Those which can not be considered together.

⁴³ Egery v. Power, 5 Texas, 501.

Group One. Claims Applied to Each Other by Law.

The civil law, under the designation of "Compensation," recognized the principle of merger by law to a much greater extent than it has ever been in Texas since the Act of 1840. These rules of the civil law were exhaustively discussed in several of the early Texas cases, and were declared inapplicable except in cases of mutual accounts whether between merchants and merchants or between persons not merchants.⁴⁴

The rule was expressly denied with regard to promissory notes, and has never been extended beyond the two classes of claims above mentioned.⁴⁵

Group Two. Claims Applied to Each Other by Agreement.

There is no difficulty as to the law applicable to this class of claims. If the parties have really agreed that the demands shall be applied to each other, canceling the less and crediting the larger, there can be no legal objection to such agreement and it will be enforced as any other contract; the holder of the less claim can not recover upon it, and the holder of the larger can only recover judgment for the balance. The facts as to such agreement may be and often are disputed, and much trouble may arise in determining them, but the legal rules are simple.

Group Three. Claims Disconnected but Similar.

This group embraces claims entirely disconnected in themselves, and which have not been applied to each other by law as in the first group or by agreement as in the second, but which nevertheless the defendant desires to have considered together. With reference to these claims the statutes are more specific and must be carefully considered.

The first section secures to a defendant sued for any kind of debt the privilege of setting up any counterclaim which he may have against the plaintiff, unless there be some legal rule to the contrary in the particular case; the second section prescribes the manner of pleading a counterclaim; the third section authorizes rendering judgment for the party having the larger claim for the excess; the fourth section regulates costs; the fifth contains the statutory limitations on the right guaranteed by the first; and the sixth sets out the exceptions to the limitations announced in the fifth.

The result of the statutes and decisions is: that to entitle two disconnected claims to be considered together they must both be due on

⁴⁴ Holiman v. Rogers, 6 Texas, 91; Hall v. Hodge, 2 Texas, 324.

⁴⁵ Holiman v. Rogers, *supra*; Campbell v. Park, 11 Texas Civ. App., 455, 33 S. W., 754.

contract—that is, grow out of the breach of contract obligation;⁴⁶ the statute does not cover disconnected claims for damage for tort.⁴⁷

Both claims must exist between the same parties and in the same capacity;⁴⁸ he who is sole creditor in the one must be sole debtor in the other, and all of those that are joint creditors in the one must be joint debtors in the other; but if one of the parties is insolvent this last requirement is relaxed and the counterclaim permitted.⁴⁹

As there has been no application of these claims the one to the other previous to the suit, either by the action of the law or of the parties, they must both have been valid subsisting claims at the time the litigation begun, or the counterclaim must have arisen subsequent to the litigation; and in either event, they must each be a valid subsisting and enforceable legal claim at the time the court is called on to make the application of the one to the other.

If all these conditions exist, the defendant may plead his demand in counterclaim against the plaintiff and obtain credit therefor, if it be the less, or judgment for the excess if it be the greater, the costs in the latter case to be regulated by the statute; if any one of these facts is wanting, the counterclaim will not be permitted.

Before leaving this group, it may be well to present the matter negatively. Disconnected claims, one for liquidated and the other for unliquidated demands; such claims based one on breach of contract and the other on tort;⁵⁰ or claims arising from different torts,⁵¹ can not be offset one against the other. This is not affected by the insolvency of either of the parties.⁵²

⁴⁶ *El Paso Nat. Bank. v. Fuchs*, 89 Texas, 197, 34 S. W., 204; *McCarty v. Squyres*, 34 S. W., 356; *Snelling v. Koerner*, 27 S. W., 887; *Bank v. Lynch*, 6 Texas Civ. App., 591; *June v. Brubaker*, 5 Texas Civ. App., 79; *Jones v. Hunt*, 74 Texas, 657, 12 S. W., 832.

⁴⁷ *Hart v. Davis*, 21 Texas, 412; *Shook v. Peters*, 59 Texas, 395; *Smith v. Bates*, 80 Texas, 242, 27 S. W., 1044; *Rev. Stats. 1895*, art. 754; cases cited *supra*, note —; *Bodman v. Harris*, 20 Texas, 33; *Sanders v. Bridges*, 67 Texas, 94, 2 S. W., 663.

⁴⁸ *Hubby v. Camplin*, 22 Texas, 583; *Guthrie v. Guthrie*, 17 Texas, 542; *Atchison v. Smith*, 25 Texas, 230; *Traders' Nat. Bank v. Cresson*, 75 Texas, 299, 12 S. W., 819.

⁴⁹ *Allbright v. Aldrich*, 2 Texas, 166; *Castro v. Gentilly*, 11 Texas, 28; *Hamilton v. Van Hook*, 26 Texas, 306; *Haley v. Cusenbary*, 30 S. W., 587.

⁵⁰ *Duncan v. Magette*, 25 Texas, 257; *Rogers v. Watson*, 81 Texas, 404, 17 S. W., 29; *Parks v. Dial*, 56 Texas, 263; *Riddle v. McKinney*, 67 Texas, 29, 2 S. W., 748.

⁵¹ *Hart v. Davis*, 21 Texas, 412; *Shook v. Peters*, 59 Texas, 395; *Smith v. Bates*, 80 Texas, 242, 27 S. W., 1044.

⁵² *Duncan v. Magette*, *supra*.

Group Four. Claims Dissimilar but Connected.

The fourth group of claims is especially provided for in the last clause of the statute. Its present form is not identical with either the Act of 1840 or 1860, but it embodies the construction placed on the former acts by the court.⁵³

As it is not entirely clear just what connection between the claims the statute requires, it will be advisable to review some of the decisions.

*Walcott v. Hendrick*⁵⁴ is a suit in which the plaintiff sued the defendant for liquidated debt and had an attachment issued and levied on the property of the defendant. The defendant claimed that the attachment was wrongfully procured, and sought by cross-action to recover the damages resulting therefrom. Exception was filed to this plea on ground that the plaintiff's suit was on a liquidated demand based on contract, and the damages sought by defendant were unliquidated and for tort. The court considered the question very carefully, and comparing the several clauses of the statute and reviewing civil and common law authorities, arrived at the conclusion that the statute construed as a whole allowed liquidated claims to be set up against each other; that as a general rule it prohibited the consideration of a liquidated claim against an unliquidated one, but if the demand sought to be adjudicated by the defendant was necessarily connected with and incident to the suit as brought by the plaintiff, it was a proper matter of cross-action whether liquidated or unliquidated,—and, applying these general principles to the case in hand, the court held the plea for damages proper.

The case of *Sterrett v. City of Houston*⁵⁵ presents the question in a very interesting way. The city was at that time (1855) incorporated under a law of the Republic of Texas. The charter conferred the power to collect certain public dues as wharfage, and required the expenditure of the money in keeping Buffalo Bayou open and in proper condition for navigation. These dues had been collected for many years, but had not been applied to the improvement of the bayou. Sterrett owned a vessel which he operated on the bayou. His boat was injured by obstructions in the bayou, which the city could have removed by use of the money collected for that purpose. The city sued Sterrett for the wharfage charges due from him; he plead in cross-action the damages sustained by injury to his boat. The lower court struck out the cross-action. In the higher court this was held error, and the judgment was reversed.

⁵³ *Scalf v. Tompkins*, 61 Texas, 479.

⁵⁴ *Walcott v. Hendrick*, 6 Texas, 405, 1851.

⁵⁵ *Sterrett v. City of Houston*, 14 Texas, 153, 1855.

In *Wiley v. Traiwick*,⁵⁶ suit had been brought in Louisiana on a note and attachment issued and goods of the defendant seized and kept; the case was dismissed without restoration of the goods, and before defendant could plead in cross-action. Subsequently the same plaintiff sued the same defendant in a Texas court on the same cause of action, and the defendant plead in cross-action the damages occasioned by the wrongful issue and levy of the Louisiana attachment. It was held that the plea was good, and that the fact that the attachment was obtained in another suit and in another State did not affect the right to reconvene. This doctrine as to damages arising from tort in another State is questioned by Judge Bell in the subsequent case of *Withee v. Fearing*.⁵⁷

In *Griffin v. Chubb*⁵⁸ the plaintiff brought suit which he could not maintain. One of the defendants set up in cross-action a note growing out of the transaction on which the plaintiff based his cause of action, asking for judgment against plaintiff as indorser thereon. This note was not due when plaintiff brought suit, but was due when defendant filed his cross-action. As the plaintiff failed in his case the court refused to give judgment for the defendant on his cross-action. This was held to be error. The fact that the note was not due when the plaintiff sued did not affect the defendant's right to sue on it when it did mature, and the plaintiff's failure to maintain his case did not destroy the defendant's right to his cross-action.

*Ashworth v. Dark*⁵⁹ is a suit brought to foreclose a mortgage on personal property. Defendant answered admitting the debt, but alleging that plaintiff had been in possession of the mortgaged property, had converted it to his own use, and that it was of value greater than the debt. This was held a proper cross-action.

Carothers v. Thorp,⁶⁰ is a suit on two notes given at same time, one for the hire of a negro, and the other for rent of land. Defendant plead in cross-action a number of items of damages. And alleged inferentially that these damages grew out of the matters for which the notes were given, but there was no direct and specific allegation to that effect. The plaintiff filed a special demurrer to the plea because it was not shown to be proper matter for cross-action, and the demurrer was sustained. The Supreme Court in affirming this decision announced that the defendant must show affirmatively and directly the connection of the matters relied on by him with those sued on by the plaintiff.

⁵⁶ *Wiley v. Traiwick*, 14 Texas, 662, 1855.

⁵⁷ 25 Texas, 504.

⁵⁸ *Griffin v. Chubb*, 16 Texas, 219, 1856.

⁵⁹ *Ashworth v. Dark*, 20 Texas, 825.

⁶⁰ *Carothers v. Thorp*, 21 Texas, 362, 1858.

*Slaughter v. Harley*⁶¹ teaches that where the plaintiff sues on several separate demands, the defendant may plead in cross-action matters properly connected with any of them, and after he has done so his right to trial on these matters can not be defeated by the plaintiff by dismissing the particular claim to which the reconvention was related.

In the case of *Goodhue v. Meyers*,^{61a} the plaintiff sued on an account for merchandise. The defendant plead in cross-action a claim for unliquidated damages for seizure of certain personal property by plaintiff. The original account and this property had no connection whatever, and its taking was not under legal process in an effort to collect the account sued on. The parties had, however, agreed that the defendant should sell the property to designated parties and pay the profits to the plaintiff, and the plaintiff had agreed to receive these profits and to apply them on the defendant's debt. As the defendant was in the act of delivering this property under the sale and realizing the profits, the plaintiff took it and thus prevented the defendant from obtaining his profit. The agreement between the parties as to the application of the profits to the debt sued on brought about such a connection between the claim sued on and the one set up by the defendant as to entitle him to maintain his cross-action. This is more properly an illustration of the second class in which the right to set off the one claim against the other depends on agreement than of such original connection between the claims as to entitle them to consideration together.

In *Stewart v. Insall*,⁶² the plaintiff sold the defendant a tract of land claiming to be the agent of another whom he represented as the owner. Part of the purchase money was paid to the plaintiff and a note for the balance was given to him. Defendant refused to pay the note, and plaintiff sued in his own name upon it. The defendant set up the failure of title to the land, and that the plaintiff had acted fraudulently in representing himself as agent when his principal was dead, and asked for cancellation of the note and for judgment for the purchase money which he had formerly paid. The lower court sustained exceptions to this plea and rendered judgment for the plaintiff for the amount of the note. On appeal it was held that the cross-action was good and the judgment was reversed.

*Heilbronner v. Douglas*⁶³ recognizes the familiar doctrine that the defendant in an attachment suit may plead in reconvention damages sustained by him in the wrongful suing out of the writ or wrongful conversion of the property thereunder.

⁶¹ *Slaughter v. Hailey*, 21 Texas, 537.

^{61a} *Goodhue v. Mayers*, 58 Texas, 403.

⁶² *Stewart v. Insall*, 9 Texas, 397.

⁶³ *Heilbronner v. Douglas*, 45 Texas, 405.

Group Five. Claims which Can Not Be Plead Against Each Other.

The fifth group embraces all those claims for money which do not meet the conditions of any one of the four preceding groups. They require no special consideration, as their characteristics are unimportant in this connection, for whatever they may be the one can not be set up as a counterclaim against the other.

Pleading Rights in Rem, in Reconvention.

There are claims not falling under any of the above groups, because they are based on the one side or the other, or both on property rights. These do not come within the express terms of the statute, but are governed by the doctrines of the old Spanish law and of the courts of equity as modified by the statute. And it is held that the doctrine of reconvention will permit the filing of a cross-action whenever the rights sought to be thus litigated, whether property rights or rights *in personam*, relate to, grow out of, or are directly connected with, the same thing or transaction.

The case of *Egery v. Power*,⁶⁴ decided at the Galveston term, 1851, is an action of trespass to try title to land and for mesne profits. The defendant set up title and alleged trespass by the plaintiff and also sued for mesne profits. The plaintiff dismissed his suit. The defendant insisted on trial on his cross-action. The lower court held that the statute did not authorize cross-actions in suits for property, and dismissed the action. The defendant appealed, and the court held that the right of reconvention was derived from the civil law, and was not dependent on the statute, and that it extended to assertion of property rights, as well as claims for money; and as the cause of action set up by defendant was directly connected with the same thing as that set up by the plaintiff, the cross-action was proper and it was error to dismiss the case.

In *Bradford v. Hamilton*,⁶⁵ a suit for land tried in 1851, the defendant plead in cross-action. The plaintiff's title failed, he dismissed, and defendant insisted on trial on cross-action. This was denied and the whole case dismissed. On appeal the judgment was reversed. In the opinion the court said: "The doctrine is this: If the defendant has a cause of action against the plaintiff, touching the subject matter of the suit, he may set it forth in his answer and have legal redress against the plaintiff, to which he is entitled in the same manner and to the same extent as if he were originally plaintiff."

⁶⁴ *Egery v. Power*, 5 Texas, 501.

⁶⁵ *Bradford v. Hamilton*, 7 Texas, 55.

There are numerous other cases to same effect,⁶⁶ and the practice is too firmly established now to admit of question.

There are also pleas in reconvention which are admitted under the equity jurisdiction of the court. If a suit is brought to enjoin a judgment, it is always permissible for the defendant in the injunction proceedings to set up the claim upon which the judgment was based and recover a judgment on it. Or if damages are occasioned by the suing out of the wrongful injunction, this may be set up by the defendant in the injunction suit by way of cross-action. Again, in cases of fraud in the sale of property, the purchaser can in proper time and manner rescind the sale and recover the purchase money, or he may keep the thing and offset the damage occasioned by the fraud against the price.

Rules of Pleadings in Cross-Action.

The rules of pleading in presenting a cross-action are just the same so far as the substance of the plea is concerned as if the defendant were instituting suit on the same matter. The form is, of course, different.

This should also be remarked as to setting out the substance; not only must the cross-action present a good cause of action against the plaintiff, but it must affirmatively and directly show such facts as make it a proper matter to be considered in opposition to the plaintiff's claim,⁶⁷ and unless it does this it will be stricken out on demurrer, though considered by itself it would be good to sustain an independent suit.

When the defendant has plead in cross-action, the plaintiff can not dismiss his suit and avoid responsibility on the defendant's plea.⁶⁸

Recapitulation.

First. The statutes on counterclaims are construed in the light of the civil law and equity practice.

Second. In a few cases the civil law doctrine of compensation is recognized and enforced, but these are limited by the early decisions to mutual accounts and the courts refuse to extend them.

⁶⁶ *Hammonds v. Belcher*, 10 Texas, 271; *Carlin v. Hudson*, 12 Texas, 202; *Scalf v. Tomkins*, 61 Texas, 476.

⁶⁷ *Castro v. Gentilly*, 11 Texas, 31; *Carothers v. Thorp*, 21 Texas, 361; *Heilbronner v. Douglas*, 45 Texas, 403.

⁶⁸ *Rev. Stats. 1895*, art. 1260; *Walcott v. Hendrick*, 6 Texas, 413; *Bradford v. Hamilton*, 7 Texas, 59; *Slaughter v. Hailey*, 21 Texas, 537.

Third. Parties may by agreement so connect claims existing between them as to make them proper to be considered in connection with and in opposition to each other, even though the claims considered apart from such agreement could not be so dealt with.

Fourth. Under the statute liquidated claims may be offset, one against the other.

Fifth. An unliquidated claim for breach of contract may be offset against another unliquidated claim for breach of contract.

Sixth. An unliquidated claim can not ordinarily be offset against a liquidated one, and *vice versa*.

Seventh. An unliquidated claim can be offset against a liquidated one and *vice versa*, provided they grow out of the same cause of action, but in such cases the cross-action must allege the facts constituting the connection between the claims and must make appropriate prayer for relief.

Eighth. That unliquidated claims based on two or more separate and distinct torts can not be offset against each other.

Ninth. That the doctrines of cross-actions embrace not only money claims but also rights *in rem*; and if the proper connection exists between the claims of the respective parties to a piece of property or between a claim to property on the one hand and for money on the other, they may be considered together.

Tenth. That for rights to be offset against each other they must be due between the same parties and in the same capacity. He who is sole creditor in one must be sole debtor in the other, and those who are joint creditors in one must be joint debtors in the other. To this there are some exceptions allowed in cases of insolvency.

Eleventh. When the claims fall in either the first or second group, and have already been applied to each other, the rights of parties are to be determined on the basis of the facts existing at the time of the application. When the claims have not antecedently been merged and the court is called on to make the application and adjustment, it must be made as of the date of filing the pleading setting them up respectively, testing each claim just as if it were sued on alone.

Twelfth. That the party establishing the larger claim is entitled to judgment against his adversary for the difference between them and for costs if he held his claim at the time suit was brought, but if he acquired the claim after he were sued by the other party, then the plaintiff should recover costs.

Thirteenth. The defendant having properly set up his cross-action, his right to a hearing and adjudication of the issues thereby tendered can not be cut off by the plaintiff either by the voluntary dismissal of his case or by the failure to establish it on the trial.

CHAPTER XV.

PLEADINGS IN SPECIAL CASES.

There are several different kinds of suits in which the rules of pleading are, or at least are thought to be, peculiar, and on that account it may be well to treat these cases specially pointing out in each the correspondence with and differences from the rules in ordinary suits. The most important of these special actions is trespass to try title. It will be considered in the next chapter; others requiring less detailed attention will be taken up in this in the following order: libel and slander, *mandamus*, *quo warranto*, and trial of the right of property. The treatment will not be exhaustive, but will be sufficiently extended to give the rules of pleading governing each.

LIBEL.

The rules of pleading in actions for damage for libel are not different from those in other cases, though a short consideration of their application may be advisable. Here, as elsewhere, the plaintiff in his petition must bear in mind the substantive law governing his rights, and must allege such facts as show his right and the defendant's violation of that right, and the injury resulting either as a presumption of law or in fact. As the right violated is ordinarily one of a personal nature pertaining alike to all men, there is but little, if any, difficulty in setting it out, and a general allegation of good character and reputation in respect to the elements of character involved in the statement usually are sufficient on that branch of the case. If, however, the libelous statements affect the plaintiff in some special relation or connection as in an official capacity or business relation, then the special facts must be alleged, as that he was the incumbent of the office or engaged in the business, etc.

The wrong charged against the defendant should be clearly and certainly set out.

In the case of the *Bradstreet Company v. Gill*,¹ the court says: "Our rules of pleading require that the petition shall set forth 'a full and clear statement of the cause of action, and such other allegations pertinent to the cause as the plaintiff may deem necessary to sustain

¹ 72 Texas, 115, 9 S. W., 753.

his suit,' etc. It has been many times decided by our courts that the common law distinctions as to pleading and its technicalities do not prevail with us, but that a clear and logical statement of the cause of action is all that is necessary. A clear statement of the facts constituting the cause of action can not, however, be dispensed with. The character of the suit must be the guide to the pleader, and enough must be stated to constitute a cause of action. In a suit on a note it will be sufficient to state the substance and legal effect of the note; not so in a suit for libel. A libel suit is based on language or its equivalent.

"The complaint in a libel suit should put the court in possession of the libelous matter published, the language used, with such innuendoes as are necessary to explain what is meant by the language, and to whom it applied, so as to enable the court to determine whether the words are actionable. In this case the complaint attempts to give the meaning of the words or libel only, without stating what the libel was. If the libel consisted in reporting plaintiff's standing as a merchant 'in blank,' the complaint should have informed the court and the defendant of the fact, with such explanations as to what was meant by the report as were necessary to show that the report was injurious and defamatory. This is not a case where the pleader must from the nature of the publication resort to a verbal description of the slanderous matter, as it would be when movements, postures, or pictures are used. Plaintiff could have stated his cause of action as it was in clear terms. He has not done so. It is not sufficient in this kind of a suit to state the substance of the language or its meaning. We believe the general demurrer ought to have been sustained. See *Townsend on Slander and Libel*, sections 329 to 335, inclusive."

The very words written should be quoted or repeated just as used by the defendant.² If they are intelligible and in terms relate to plaintiff in the capacity in which he brings his suit and sets out his right, there need be no explanation or application of them; but if the meaning is doubtful or their relation to the plaintiff not clearly apparent the pleader should add appropriate innuendoes or explanatory remarks or comments declaring specifically and clearly the exact meaning attributed by him to the words and their reference or application to the plaintiff. It is not necessary, however, to set out the whole publication or article in which the defamatory statements are made. All that is required in this behalf is to quote or copy those portions which are libelous. If, however, it appears from the extracts given that there are other portions of the article or publication, which qualify or modify these, then these modifying portions

² *Runge v. Franklin*, 72 Texas, 585, 10 S. W., 721; *Bradstreet v. Gill*, *supra*.

should also be given so that the court may judge for itself of the nature of the communication as a whole and not be dependent on the conclusion of the pleader as to its libelous character.³ The falsity of the charges should be averred. It is often said that it is not necessary to allege facts which are not required to be proved, but this is one of those glittering generalities which often are better calculated to mislead than to aid in a proper solution of many of the practical questions which come up. Such is the case here. There is no need for the plaintiff to prove the falsity of the charges, for as a matter of evidence they are presumed to be false until the contrary is plead and proved; still, as the falsity is an essential element of the plaintiff's case, he must aver it in his petition.

There are some communications which are absolutely privileged, and for which no suit will lie no matter how false, malicious, and damaging they may be. Of course no form of pleading could make such statements the basis of a successful suit, if it is properly defended. There are other statements which are privileged, not absolutely, but only conditionally, that is, the party is not responsible if the statements are made in good faith without malice, and in the honest belief that they are true. When the statement sued upon appears from the plaintiff's petition to belong to this class, care must be taken by the pleader to show the absence of those conditions upon which the privilege depends, and he must not only aver the making of the statement and its falsity, but also that it was made with malice and without belief in its truth. The manner of making the publication in the particular case ought to be alleged, though the omission is not fatal on general demurrer or objection to testimony. The defect should be pointed out by special demurrer.⁴ The manner of stating the damages will depend on the nature of the libelous matter. If it belongs to one of the classes which are designated as actionable *per se*, the law presumes damage as a necessary consequence, and a general statement of damage in a given sum will suffice in all cases to sustain a nominal recovery and in some a more substantial recovery, but even in these cases it is the safer and better practice to supplement the general allegations of damage with the special facts showing actual injury. If the statements are not actionable *per se*, then the particular damage in fact resulting in the case must be plead and proved. These special damages include all the direct and proximate injurious results which naturally followed from the wrong complained of. Their kind and extent vary with the varying facts of each case.

Passing from the pleadings of the plaintiff to those of the de-

³ Wallis v. Walker, 73 Texas, 8, 11 S. W., 123.

⁴ Sinclair v. Dalien, 73 Texas, 73, 11 S. W., 147.

fendant, we find that the same general principles obtain, and that ordinarily the answer should be prepared and presented much as the answers in other kinds of cases. The effect of the general denial is, however, somewhat limited by a combination of legal presumptions which are declared to apply in cases of this sort. Mr. Cooley states this series of presumptions thus: "First, every man is presumed to be of good repute until the contrary is shown; second, a derogatory charge or insinuation made against him is presumed to be false; third, being false, it is presumed to be malicious; fourth, if its natural and legitimate effect is to cause damage, then it is presumed to have done so in this instance. But if the case is one in which injury does not necessarily follow the charge, the plaintiff will be required to allege and prove it."⁵ All these presumptions may not be indulged in full force here, but the quotation serves to show the general attitude of the law in cases of this kind. The general denial puts the plaintiff on proof of the publication, in the manner alleged, of the very words charged by him and of their application and reference to him, and also the special conditions or facts that make them damaging to him. If the words are not privileged and are actionable *per se*, this makes out a case for nominal damages. If the words are not actionable *per se*, or if they are and he wishes to secure more than nominal damages, he must allege and prove his special damage. All of these points, except the nominal damage in case of words actionable *per se*, the defendant can of course controvert and disprove under the general denial. If the statement is a privileged one and this is developed in the plaintiff's case, if the privilege be an absolute one, the matter ends there. If it be a conditional one, then in addition to the matters enumerated above the plaintiff must show lack of good faith, or actual malice, to sustain the suit. In these cases these additional facts may be controverted by the defendant under the general denial.

The truth of the defamatory matter can not be proved under the general denial, but must be specially plead.⁶ The particularity required in doing this depends on the general or specific nature of the defamatory statement. If that is general, as that "A is a thief," a general affirmation of the truth would not be good, for it would not put the plaintiff on notice as to what acts of dishonesty were sought to be proved against him, and in such instance the general allegation that the charge is true should be followed up by averments of specific instances in which A had stolen, as that at a certain time and place he stole C's horse, or D's cow, etc. The charge need not be made with all the technical accuracy and detail required in an indict-

⁵ Cooley, *Elements of Torts*, 10.

⁶ *Kuhn v. Young* 78 Texas, 345, 14 S. W., 796; *Nettles v. Somervell*, 6 Texas Civ. App., 627, 25 S. W., 658.

ment for the particular offense involved, but will be sufficient if it put the party on notice of the very matters which it will be attempted to prove against him.⁷ The truth which must be proved is the truth of the defamatory charge contained in the statement made by the defendant. This becomes important in those cases in which the language complained of is a repetition of a charge made by some one else, as that "I was told that A is a thief." Here the truth which justifies this statement is that A in fact stole something, not that the defendant was told that A was a thief.

SLANDER.

The same general rules as to pleading apply here as do in libel. The task of the pleader is frequently more difficult because of the uncertainty as to the exact words which were spoken. These have long since died away, and no fixed and permanent register of them exists. One witness may remember the words in one way, another may have the same general idea, but the words as remembered by him are different. It may also be apparent that the defendant's witnesses will give still a different version of the language used. How is the lawyer to meet this practical difficulty? Shall he gather the general sense of all these statements, ascertain what there is common to them all, and charge that the defendant made a statement of the plaintiff substantially as follows and then set out the general effect of all the varying versions? Or shall he be compelled to select the one version which he thinks it most probable he can prove and charge that *in haec verba*, and take the chances on making the jury believe that these were just the words uttered? The first would be fatal to his suit on demurrer. The law does not here permit generalization, and deduction, and the statement of general results. The language must be set out directly and positively, and in the exact words which are charged to have been uttered. Such direct and affirmative allegation having been made as to one version, the pleader should in an additional paragraph or count directly and positively allege the utterance of the words as they will be testified to by the other witness, and this process should be continued until a basis is laid in the pleading for proof of the language as remembered by each witness, and thus whoever the jury may believe, the plaintiff will have pleading upon which to rest his testimony. Care must be observed to make it apparent that each of these averments relates to and is an allegation of the same transaction, and is but a different way of stating the same legal wrong. Such allegations furnish to the court data upon which to exercise its own judgment as

⁷ Kuhn v. Young, and Nettles v. Somervell, *supra*.

to the legal effect and sufficiency of each form of the charge relied upon, and also give to the adverse party the information to which he is entitled to enable him to prepare his defense. Quite perplexing questions frequently arise as to the proof required in these cases as to the language used. Must the exact words and all of them be proved as alleged, or is it sufficient to prove language of the same general substance and meaning? The true rule seems to lie between these two extremes. Of course if the plaintiff can prove the exact language imputed to the defendant, and all of it, this is the most satisfactory form in which the case can be presented; but suppose he can not do this but can prove other language to the same general effect, is this admissible and sufficient? It is clear that simply proving language to the same general effect is not sufficient, and proving different language of a different import could not be. It seems that on the same principle the plaintiff should be required to prove a statement or statements, in substantially the same words with substantially the same meaning as those alleged. To illustrate: The charge is, A said "B is a thief;" proof that A said "B stole a horse" would be of the same general import, but would vary in the language, and the proof would not, it seems, sustain the charge; but if the charge were A said "B is a thief; he stole my horse," and the proof is, "B is a thief; he took my horse," here there is practical identity of the idea and a difference of only one word—namely, "took" instead of "stole"—in the language. The evidence should be admitted, and would sustain the charge.

This is the nearest approach to a general rule that I have been able to get from the cases.⁸

MANDAMUS.

The statutes on the subject of *mandamus* are very few and the common law precedents are not entirely applicable; consequently there is some confusion as to the proper procedure.

At common law a suit was begun by the issuance of a "writ." In ordinary cases this writ was issued as a matter of right by the proper clerk or ministerial officer upon application of the plaintiff or his counsel. Such application was informal and was no part of the record. The writ only admonished the defendant to appear at the proper time and place to answer the complaint which the plaintiff would then and there present against him. Such writs issued as of course and were "writs of right."

There were other writs which were not issued by a ministerial officer

⁸ Zelfiff v. Jennings, 61 Texas, 458.

of the court as of course, but by the court itself upon the application of some law officer or some one specially interested in the matter. In such case the application was more formal, but it did not constitute the beginning of the suit and was not part of the record. The writ granted was still the leading process and institution of the suit. When such a writ was desired it was incumbent upon the applicant to satisfy the court of the propriety of granting it, and to do this he must of course make out a *prima facie* case in his favor, and as the matters involved were frequently of a public character and the wrong complained of a failure to perform some official act required by law, the writ took the form of a rule *nisi*—that is, it would command the party complained of to do the thing charged to be his official duty by a designated time or else appear before the court issuing the writ at the time specified and show cause why he had not done so. Hence this writ commanding the party either to do the thing required or show cause for not doing so very naturally came to be known as an “alternative *mandamus*.” If the officer obeyed the command and showed this fact to the court on return day, the controversy was over. If he did not, the reasons he gave for failure were required to be very conclusive in their nature and clearly and certainly set forth, and the hearing was had largely if not entirely on this return.

To give further security against abuse in obtaining such writ, the applicant was required to make a formal application or petition in writing and under oath, and sometimes supported by accompanying affidavits from others, and great strictness came to be required in these papers. It also followed from the form of procedure that a mere denial by the respondent was not a sufficient answer to the alternative writ. If his failure to obey the rule was based upon the falsity of the matters charged against him, he was required not only to make a special traverse of the facts set out by denying the matters charged, but in addition to give the true condition of affairs. If his reason was that the facts were true but that there were others which ought to be considered, which relieved him from the duty *prima facie* made out against him, then he was compelled to set up all these matters fully and certainly by way of confession and avoidance. When the time of trial came, the respondent was required to present his return to the alternative writ and either show compliance with its commands or satisfy the court as to the matters which he had plead as an excuse for not doing so. This he might do by demurrer, showing that the matter required of him was not a legal duty, or if a duty at all it was not due to the relator; or he could disprove the facts set out against him in the writ which had been properly traversed by him in his return; or he could admit the facts as set out and destroy their effect by proof of the matters of confession and avoidance properly plead by him. Whatever form of defense he chose, the burden was on him

to establish it. The relator could controvert the points made or sought to be made by the respondent, but he was strictly speaking on the defensive. If the respondent failed in clearing himself from the *prima facie* case made out against him by the alternative writ, a peremptory writ issued against him and he was compelled to obey it under penalty of contempt.

These were practically the common law rules of procedure and pleading in *mandamus* cases when the government of Texas was founded. That they were and are inconsistent with the system of pleading by petition and answer adopted in 1840 can not be denied. That they came under the terms of the act rejecting the common law pleading seems equally clear. Notwithstanding this our courts, on the one hand, have refused to apply to these cases the simple system adopted in ordinary litigation; on the other hand have denied that the "ancient common law procedure" is to be followed in all respects, and the result is no small amount of uncertainty as to the proper method of procedure.^{8a} Only one statute specially attempting to regulate practice in these cases in any respect has ever been passed in this State. This was on May 11, 1846. Its language is: "No *mandamus* shall be granted on an *ex parte* hearing, and any peremptory *mandamus* granted without notice shall be abated on motion." This has never been repealed or amended.⁹

Under these conditions it is difficult to announce any rules at all, and impossible to do so with any certainty or confidence. In attempting to do so care must be observed to distinguish between writs of *mandamus* issued by a court or judge in a case pending as an aid to the exercise of jurisdiction already attached and proceedings instituted for the sole purpose of obtaining such a writ in vindication of some right of the relator not then in litigation. The procedure in the two cases is necessarily and essentially different. The application in the first instance is to obtain the exercise of the power of the court in some matter incidental to the main suit, and is usually made by motion in the original suit. The application in the second class of cases is the institution of a new suit entirely independent of and unaided by any other litigation or jurisdiction. It is the last class with which we are concerned.

The writ of *mandamus* in our practice is used for much the same purposes as at common law. It is always issued in the exercise of the common law, as contradistinguished from the equity power of the court. Its purpose is to compel the performance of some legal duty

^{8a} *Fitzhugh v. Custer*, 4 Texas, 396; *Watkins v. Kirchain*, 10 Texas, 479; *Sansom v. Mercer*, 68 Texas, 494, 5 S. W., 62; *May v. Finley*, 91 Texas, 354, 43 S. W., 257.

⁹ Acts 1846, p. 300; Rev. Stats, 1895, art. 1450.

due to the public, or to an individual or individuals from a public officer or from some person, natural or artificial, exercising some special power or enjoying some special privilege conferred by the government.¹⁰ It is never used to compel the discharge of a strictly private duty by a private individual.

The duty must be ministerial—that is, it must not involve the exercise of any official discretion.¹¹ The officers subject to control in this way are usually executive; but if the duty is strictly ministerial, its performance may be compelled even though it be due from a judicial officer.

In some instances in which the duty to act is imperative the officer will be compelled to proceed to its discharge although the manner in which it is to be performed involves official discretion. In such cases, all that can be required of the officer is that he act in some way, the method being left to his determination.

The writ will never be issued unless under the law and facts the duty required is clear beyond dispute.

If the official action sought involves the determination of conflicting claims and interests of several persons, the plaintiff must bring the officer sought to be compelled and all of those having adverse interests before the court and have the rights of all the parties adjudged in the one proceeding, and failure to do so will be fatal to his suit.¹²

As this is an extraordinary remedy, it can never be resorted to when the party has any other adequate legal means of redress.¹³ Inadequacy of remedy will entitle to the writ although there be some ineffective remedy provided by law.¹⁴

As the proceeding is extraordinary, greater certainty is required in the petition than in other cases.¹⁵

Neither the statute nor rules require that the petition shall be verified; but in the early case of *Bracken v. Wells*,¹⁶ it is said that on general principles this should be done. It is, therefore, more usual and the safer practice to follow this early case, although it has since

¹⁰ *Wescott v. Menard*, Dall., 504; *Tax Collector v. Finley*, 88 Texas, 520, 32 S. W., 524; *Pickle v. McCall*, 86 Texas, 212, 24 S. W., 265.

¹¹ *Sansom v. Mercer*, 68 Texas, 488.

¹² *Winder v. Williams*, 23 Texas, 604; *Smith v. Power*, 2 Texas, 68; *Cullem v. Lattimer*, 4 Texas, 334; *Commissioner v. Smith*, 5 Texas, 484; *Watkins v. Kerchain*, 10 Texas, 381; *Gaal v. Townsend*, 77 Texas, 465, 14 S. W., 365.

¹³ *Arberry v. Beavers*, 6 Texas, 473.

¹⁴ 14 Am. and Eng. Enc. of Law, 102, note 4.

¹⁵ *Commissioner v. Smith*, *supra*; *Arberry v. Beavers*, *supra*; *Railway Co. v. Randolph*, 24 Texas, 317; *Tex. Mex. Railway Co. v. Locke*, 63 Texas, 630; *State v. Street Railway Co.*, 10 Texas Civ. App., 12, 30 S. W., 265.

¹⁶ 3 Texas, 88.

been held¹⁷ that verification is not absolutely necessary. In the decision referred to, the court determined that there was no error in overruling a general demurrer to a petition which was good except for want of verification; but it is not indicated in the opinion what would have been the result had a special exception been interposed on that account.

The petition should show that the applicant has no other adequate and available remedy.¹⁸

These special rules as to certainty in the petition, etc., seem to grow partially out of the ancient forms of procedure, and partially out of the fact that, in many instances, the proceeding is against an officer by whose official acts the interests of the public might be seriously affected. For these reasons the court is required to look more closely into the matters presented in the petition, and, unless they show a substantial right and real violation, relief should not be granted, even though the defendant should not be very vigilant in his defense. On the other hand, the same considerations require that when the plaintiff does clearly and certainly show himself entitled to the relief sought, the defendant must make a careful and satisfactory showing of the reasons for his nondischarge of his duty.

From these considerations it has been decided that a general denial is not a sufficient answer to a petition which sets up a good cause of action; the defendant must go further,—he must show fully the reasons and facts which justify him in refusing to do that which the plaintiff, by his pleadings, shows to be his plain duty.¹⁹

There is no necessity for the issuance of a formal “rule” on the respondent to compel him to appear and show cause why the writ should not issue.²⁰ The filing of a sufficient petition and the issuance and service of citation, as in ordinary cases, is all that is required where the plaintiff seeks relief only on the final judgment. If, however, he wishes some action to be taken at once by interlocutory order, then he should verify his petition and have some time fixed for a hearing by the court,²¹ or judge, as the case may be, and notify the adverse parties. In such cases he may, after hearing, and upon proper showing made, obtain an interlocutory or temporary writ.

There seems to be no reported case which definitely decides that the writ just mentioned may issue; but it is clearly stated in the constitu-

¹⁷ *Brown v. Ruse*, 69 Texas, 589, 7 S. W., 489.

¹⁸ *Arberry v. Beavers*, 6 Texas, 473; *Commissioner v. Smith*, 5 Texas, 471.

¹⁹ *Sanson v. Mercer*, 68 Texas, 494, 5 S. W., 62; *May v. Finley*, 91 Texas, 354, 43 S. W., 257; *Fitzhugh v. Custer*, 4 Texas, 398.

²⁰ *Murphy v. Wentworth*, 36 Texas, 147.

²¹ Rev. Stats. 1895, art. 1460.

tional provision that the court or judge shall have power to issue writs of this kind either in term time or in vacation.

There are two cases construing the statute of 1846, already referred to.²² One of these²³ holds that there is no necessity in our practice for an alternative writ, the citation being sufficient; and that the citation should not be returnable before the judge in vacation, but before the court in term time, when the peremptory writ may be granted. The second holds that no *ex parte* writ can properly be granted. In neither of these cases does the court pass upon the power of the judge to issue in vacation a temporary writ, after notice given to the adverse party.

As already indicated, the influence of the common law upon our pleading in these cases has been very great. Thus, it has been expressly held that it is better practice to swear to the petition;²⁴ and, in a much later case, common law authorities are cited as conclusive that a general denial and a statement of matters constituting no defense are no answer, and that plaintiff, having a good petition, is entitled to judgment by default where only such a denial and statement have been filed.²⁵ But the common law rules are not followed in the trial of the case, for if the defendant does put in such a denial and traverse of the petition as to join issue, the burden of proof seems to rest upon the plaintiff; he must show a clear and certain right in himself and a refusal to recognize and respect the same upon the part of the defendant.

There is some diversity of opinion as to the necessity for a demand of performance of the duty before bringing suit. It seems to be the true rule, that a definite and specific demand upon the defendant and a refusal by him must be shown in all cases, unless the conduct of the defendant is legally equivalent to such a refusal,—as where one is entitled to recognition as an officer and defendant has recognized another as such officer. If the duty devolves upon several and may be performed by any one of them, demand must be made of each; if it devolves upon a majority of a certain body, then it must be made on such number as to show that a majority will not act; if it devolves upon a number of persons collectively, then the demand must be made upon them collectively.²⁶ When demand is necessary it must be alleged. If the facts render it unnecessary this must be shown.

²² *Supra*.

²³ *Murphy v. Wentworth, supra*.

²⁴ *Bracken v. Wells, supra*.

²⁵ *Sansom v. Mercer, supra*.

²⁶ 14 Am. an Eng. Enc. of Law, 105, 106, 107.

QUO WARRANTO.

Originally the writ of *quo warranto* was a high prerogative common law writ of a criminal nature. At an early day this was replaced in the English practice by an information in the nature of a *quo warranto*, which, though still retaining some of the criminal features, was essentially a civil remedy. This change was effected largely, if not entirely, by the statute of 9th Anne. When this remedy was first invoked in the courts of Texas, it was held that this English statute did not apply and the writ could issue only in those cases in which it could have been obtained under the ancient common law.²⁷

There was no legislation in Texas on this subject until 1879, when the present statute was enacted. It is in these words: "In case any person shall usurp, intrude into, or unlawfully hold or execute, or is now intruded into, or now unlawfully holds or executes any office or franchise, or any office or any corporation created by the authority of this State, or any public officer shall have done or suffered any act which by the provisions of law works a forfeiture of his office, or any association of numbers of persons shall act within this State as a corporation without being legally incorporated, or any incorporation does or omits any act which amounts to a surrender or a forfeiture of its rights and privileges as a corporation, or exercises power not conferred by law, or if any railroad company doing business in this State shall charge an extortionate rate for the transportation of any freight and passengers, or refuse to draw or carry the cars of any other railroad company over its line as required by the laws of this State, the attorney-general, or district or county attorney of the proper county or district, either of his own accord or at the instance of any individual relator, may present a petition to the district court of the proper county, or any judge thereof, in vacation, for leave to file an information in the nature of a *quo warranto* in the name of the State of Texas; and if such court or judge shall be satisfied that there is a probable ground for the proceeding, the court or judge may grant the petition and order the information to be filed and process to issue.

"When it appears to the court or judge that the several rights of divers parties to the same office or franchise may properly be determined on one information, the court or judge may give leave to join all such persons in the same information in order to try their respective rights to such office or franchise.

"When the information is filed, as hereinbefore provided, the clerk shall issue citations in like form as in civil suits, commanding the

²⁷ Wright v. Allen, 2 Texas, 158; Banton v. Wilson, 4 Texas, 400.

defendant to appear at the return term of said court to answer the relator in an information in the nature of a *quo warranto*. If the information is filed in vacation the citation shall be returnable on the first day of the next succeeding term; if in term time, it may be made returnable on any day of the same term, not less than five days after the date of the writ, as shall be directed by the court.

"Every person or corporation who shall be cited as hereinbefore provided shall be entitled to all the rights in the trial and investigation of the matters alleged against him, as in cases of trial of civil causes in this State; and in cases of appeal, to which either party shall be entitled, the said court shall give preference to such case and hear and determine the same at the earliest day practicable; and all such appeals shall be prosecuted to the term of the court in session, or the first term to be held, if not in session, after the judgment has been rendered in the district court.

"In case any person or corporation against whom any such proceeding is filed shall be adjudged guilty, as charged in the information, the court shall give judgment of ouster against such person or corporation from the office or franchise, and may fine such person or corporation for usurping, intruding into, or unlawfully holding and executing such office or franchise, and shall also give judgment in favor of the relator for costs of the prosecution.

"The remedy and mode of procedure hereby prescribed shall be construed to be cumulative of any now existing.

"Suits against persons illegally claiming or holding any State office or appointment as contradistinguished to a county or district office, shall be brought in the district court of Travis County."²⁸

This statute is practically the equivalent of the 9th Anne, and made very decided changes in our law on this subject. One of the first and most important cases construing this act is *State v. De Gress*, decided in 1880.²⁹ The opinion presents the matter so clearly and strongly that we quote from it at length as follows:

"The proceedings authorized by our statute are substantially the same as that in the statute of 9th Anne, and although in form a criminal method of prosecution, has long been held by the standard text writers and the courts to be 'in its nature a civil remedy,' 'applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrong possessor; the fine being nominal only.' 2 Kent, p. 313; 3 Blackst., p. 263; High on Ex. Rem., secs. 603-710, and cases cited; Angell & Aimes on Corp., sec. 733; *State v. Hardie*, 1 Ired., 42; *State Bank v. State*, 6 Blackf., 272; *State v. Kupferle*, 44 Mo., 155;

²⁸ Acts Special Session, 1879, p. 43; Rev. Stats. 1895, title 93.

²⁹ *State v. De Gress*, 53 Texas, 387.

Com. Bank v. State, 4 Smedes & Marshall, 504; Commonwealth v. Commis. of County of Phila., 1 S. & R., 385; People v. Utica Ins. Co., 15 Johns., 386; Tomlin's Law Dict., title 'Quo Warranto;' Cole on Crim. Informations (Law Lib., vol. 49), pp. 125-7; Banton v. Wilson, 4 Texas, 400. Says Gaston, J., in State v. Hardie, supra: 'Originally this was a criminal proceeding. In it the usurpation was charged as an offense, and the offender, upon conviction, was liable to fine and imprisonment. Such, however, were the conveniences attending the information, as a mode of trying the mere question of right to the office or franchise, that, though it never entirely lost its form as a criminal proceeding, it was so modeled as to become substantially a civil action. Fine, indeed, was imposed upon conviction; but it was nominal only,—no real punishment was inflicted,—and it became before our revolution the general civil remedy for asserting and trying the right, in order to seize the office or franchise, or to oust the wrongful possessor. 21 Ired., 48.'

"Again he says: 'The proceeding before us is carried on *diverso intuitu*, and to hold it prohibited by the bill of rights would be to sacrifice substance to mere form. If, indeed, it should ever be attempted, in proceedings of this character, to impose a real fine, or to inflict any other punishment, so as to make them in effect criminal prosecutions, such attempts would fall before the explicit prohibitions of the bill of rights now so needlessly invoked.' 1 Ired., 49.

"The provision of our statute that the court 'may fine such person or corporation for usurping, intruding into, or unlawfully holding and executing such office or franchise,' is designed to receive the practical construction given it under that statute, and to be inoperative save as a nominal fine.

"If, however, it should be construed as a criminal statute, authorizing the court to impose an indefinite fine, it would in our opinion fail to conform to the requirements of our law in affixing the penalty; and to the extent of the fine will be inoperative. Rev. Stats., Penal Code, art. 3.

"The statute, however, itself directs the clerk to 'issue citation in like form as in civil suits;' that the person or corporation 'shall be entitled to all the rights in trial and investigation of the matters alleged against him, as in case of trials of civil causes in this State,' and expressly entitles either party to an appeal.

"As the Constitution denies the State the right of appeal in criminal cases, it is plain that the Legislature intended it to be classed as, and practically to be, a civil case.

"Our opinion is, that the statute in effect but provides for a civil suit in the name of the State to oust one who holds an office in violation of law, or a corporation exercising franchises which it has forfeited.

"Regarded as a civil suit in behalf of the State, the 'matter in con-

troverſy being a right to an office of the value of \$500, the diſtrict court under the Conſtitution had juřiſdiction to try it; and that part of the act which directs the proceeding to be in the diſtrict court is not in conflict with the Conſtitution.' Conſt., art. 5, ſec. 8.

"Actions to try the right to an office, as diſtinguiſhed from conteſted election caſes, have before the preſent Conſtitution pertained to the juřiſdiction of the diſtrict court. *Banton v. Wilson*, 4 *Texas*, 400; *Bradley v. McCrabb*, *Dallam*, 506."

The rules thus eſtabliſhed have not ſince been changed, and under this ſtatute the information in the nature of a *quo warranto* has been recognized as the proper remedy in a number of caſes which clearly do not come within the narrow limits fixed in the earlier deciſions.

From the earlieſt period of our hiſtory this proceeding has been recognized as the proper remedy in behalf of one entitled to a public office againſt the intruder, and this is ſtill the correct practice.³⁰

That the office is municipal as diſtinguiſhed from a State office does not affect the State's right to inſtitute and maintain this proceeding.³¹

When perſons unlawfully aſſume to act as a corporation, public or private, without any authority of law or under color of authority not legally ſufficient, this is the proper method to diſſolve ſuch unlawful combination;³² if there is color of authority in the corporation, this is the excluſive method by which it may be attacked. This rule was applied to the reſiſtance of the payment of municipal tax becauſe the corporation claiming to levy and collect it was unlawful.³³ If the corporation is lawful but there is ſome defect in the levy or other matter pertaining to the exerciſe of the power, this is not an appropriate remedy.

This is alſo the proper proceeding to ouſt a perſon or corporation from the unlawful or uſurped enjoyment of a franchise;³⁴ alſo to adjudge the forfeiture of a franchise for miſuſer or nonuſer, but not to ſuſpend or regulate the exerciſe of a lawful power, nor to enforce a private contract or exact penalties for its violation.³⁵ A corporation

³⁰ *Ex Parte De Bland*, *Dall.*, 406; *Bradley v. McCrabb*, *Dall.*, 504; *Wright v. Allen*, 2 *Texas*, 158; *State v. Owen*, 63 *Texas*, 270; *Williams v. State*, 69 *Texas*, 368, 6 *S. W.*, 845; *Dean v. State*, 88 *Texas*, 295, 30 *S. W.*, 1047, 31 *S. W.*, 185.

³¹ *State v. Wofford*, 90 *Texas*, 514, 39 *S. W.*, 921.

³² *State v. Dunson*, 71 *Texas*, 65, 9 *S. W.*, 103; *State v. Goowin*, 69 *Texas*, 55, 5 *S. W.*, 678; *Ewing v. State*, 81 *Texas*, 172, 16 *S. W.*, 872; *Matthews v. State*, 82 *Texas*, 577, 18 *S. W.*, 711.

³³ *Brennan v. Weatherford*, 53 *Texas*, 337.

³⁴ *Morris v. State*, 62 *Texas*, 728.

³⁵ *Morris v. Leona*, 67 *Texas*, 303, 3 *S. W.*, 281.

can not in such a proceeding be deprived of immunities or privileges which are in the nature of property rights.³⁶

Parties.

This action should always be brought in the name of the State as plaintiff.³⁷ Very frequently some private person is interested in the subject matter of the suit; in such case he usually becomes the relator, that is, the person who applies to the proper officer of the State to induce him to institute the proceeding and relates to him the facts making this action proper. This relation is usually in the form of a written statement or petition under oath, and is presented by the officer to the court when he makes request for the privilege of filing the information.³⁸ In such cases the State is the real party and controls the litigation.³⁹ Even in cases in which the rights of the public alone are involved it is customary for some one to act as relator;⁴⁰ though the statute gives to the proper officer the right to institute the action on his own motion.

For acts in violation of article 4, section 22, of the Constitution, the Supreme Court has held that no one except the attorney-general is authorized to file the information; so much of the statute as attempts to confer authority on district and county attorneys to prosecute in such cases being unconstitutional.⁴¹ In all other cases it may be filed by the attorney-general or the district or county attorney of the proper district or county.

The statute contemplates a petition separate from the information. It has been held that it is not absolutely essential to prepare and file such separate instrument, though it is the better practice.⁴²

The act does not in terms require that either the petition or the information shall be sworn to, but the practice under the statute of Anne and also under statutes in other States similar to ours require it, and our Supreme Court has commended the practice and declared it desirable.⁴³

When the court or judge has given permission to file the information,

³⁶ *Railway Co. v. State*, 75 Texas, 356, 12 S. W., 685.

³⁷ Rev. Stats., title 93, sec. 1, *supra*; *Morris v. State*, 62 Texas, 729; *Fowler v. State*, 68 Texas, 30, 3 S. W., 255.

³⁸ *State v. Owens*, 63 Texas, 270; *McAllen v. Rhodes*, 65 Texas, 348.

³⁹ *Matthews v. State*, 82 Texas, 577, 18 S. W., 711.

⁴⁰ *East Dallas v. State*, 73 Texas, 370, 11 S. W., 1030.

⁴¹ *State v. Railway Co.*, 89 Texas, 563, 35 S. W., 1067.

⁴² *East Dallas v. State*, *supra*.

⁴³ *East Dallas v. State*, *supra*; *Hunnicutt v. State*, 75 Texas, 233, 12 S. W., 106; *Little v. State*, 75 Texas, 616, 12 S. W., 965.

it seems that no further objection to preliminary matters can be urged, and the respondent is confined to his defenses against the information proper.⁴⁴

If the case presented is one in which the rights of the public alone are involved, and the judge is satisfied from all the facts that it would be harmful instead of beneficial to entertain the action, he should refuse permission to file the information; if in such case he should improvidently grant the permission, and it should develop on the trial that the judgment of ouster would be harmful to the public interests, he should refuse to enter it and dismiss the case.⁴⁵

When the proceeding is against an individual for unlawfully usurping an office or using a franchise, he alone should be made defendant. If it is against a number of persons for usurping and exercising the powers of a corporation which has no legal existence, these individuals should be joined as defendants, but the pretended corporation should not be. Where there is a corporation in existence and the design is to forfeit its charter powers and rights for nonuser or misuser, the corporation is the only necessary party; the individuals should not be sued.⁴⁶

Jurisdiction.

The writ of *quo warranto* is not named in either the constitutional or statutory grants of jurisdiction to the district or county courts. Under former Constitutions it was held that the jurisdiction of the district court in these cases depended upon the value of the office usurped or the corporate rights and privileges involved in the case.⁴⁷ Under the present Constitution the Supreme Court has decided that the district court has jurisdiction without reference to the amount in controversy, and has strongly intimated that the county court has no jurisdiction, no matter what the amount involved.⁴⁸

Venue.

In proceedings to try the right to a State office the venue is fixed by the statute in Travis County; in all other cases it is to be determined by the general rules governing in ordinary suits.

⁴⁴ *Hunnicut v. State*, *supra*.

⁴⁵ *State v. Hoff*, 88 Texas, 297, 31 S. W., 290.

⁴⁶ *Ewing v. State*, 81 Texas, 172, 16 S. W., 872; *Railway Co. v. State*, 75 Texas, 434, 12 S. W., 690.

⁴⁷ *State v. De Gress*, 53 Texas, 396; *East Dallas v. State*, 73 Texas, 370, 11 S. W., 1030.

⁴⁸ *Dean v. State*, 88 Texas, 295, 30 S. W., 1047, 31 S. W., 185.

Pleading.

As an information in the nature of a *quo warranto* is now essentially a civil suit in which the defendant or respondent is "entitled to all the rights in the trial and investigation of the matters alleged against him, as in cases of trial of civil causes in this State," the pleadings are to a large extent governed by the rules applicable in ordinary civil suits. The principal differences are that in this proceeding the information, which takes the place of the plaintiff's original petition, can not be filed without the permission of the judge or court, and that in order to obtain this the attorney for the State usually accompanies the information with a formal petition under oath made by a party interested in the matter, called the relator, which he presents to the judge or court. It is said that more particularity is required in the information than in ordinary pleadings. More restraints are placed around the right of amendment. In discussing this question in *Davis v. State*,⁴⁰ the Supreme Court says: "It is also claimed that the exceptions should have been sustained, because the allegations in the amended petition do not conform to the relation. This was not made a ground of special exception, and the assignment does not raise the question. It is not fundamental error as is contended. In view of a new trial, and that exception may hereafter be presented based upon that ground, we deem it best to pass upon it.

"There seems to be some conflict of authority in other jurisdictions upon the question whether the remedy by an information in the nature of a *quo warranto* is to be treated as a civil or a criminal action (High on Ex. Rem., secs. 700, 711), but we think that under our statute it is to be tried as a civil suit. The act authorizing this proceeding provides that a citation shall issue 'in like form as in civil suits' (section 3), and that the respondent 'shall be entitled to all the rights in the trial and investigation of the matters alleged against him as in cases of trial of civil causes in this State.' Excluding certain special provisions intended to secure a speedy disposition of the case in the trial court and upon appeal, there is nothing in the act to indicate that the rules of practice prescribed in the Revised Statutes should not apply, as far as is consistent with the nature of the proceeding. We are inclined to the opinion that an amendment to the information should not be permitted which sets up grounds for the relief sought essentially different from those alleged in the original information; but we see no reason to doubt that under our liberal system of amendment one should be allowed which contains allegations merely in enlargement of or germane to the grounds originally alleged. The rule in our State

⁴⁰ *Davis v. State*, 75 Texas, 420, 12 S. W., 957.

appears to be to allow the information in a *quo warranto* proceeding to be amended."

The pleadings by the defendant should conform substantially to the ordinary rules and may consist of general and special demurrers, of general and special denials and of independent facts alleged as a basis for and justification of the defendant's conduct in the premises. Great certainty and particularity should be observed by the defendant in setting up this new matter.

This is a very great departure from the ancient practice in which the defendant was required to establish the legality of his claim to do the acts complained of by the government.

Judgment.

The judgment rendered in each case must conform to the particular facts, and should be so framed as to correct the wrongs found by the court to exist. If the proceeding be instituted to prevent the usurpation of some corporate right or franchise the judgment should be one of ouster against the parties unlawfully exercising the powers; if it be to forfeit the charter of a corporation legally existing, it should declare such charter forfeited, dissolve the corporation, and forbid the further exercise of the corporate powers and franchise; if it be one to try the right to an office and the relator is successful, the judgment should declare his right, remove the intruder, and induct the relator into the office. If the corporation whose charter is forfeited is a private one, the judgment should make proper provisions for the protection of the rights of creditors and stockholders in its assets. If the corporation be a private one, but is engaged in some public business, so that its property is charged with a public use, the forfeiture of the charter does not relieve the property from such charge and the judgment should make due provision for the rights of the public as well as of the creditors and stockholders. This is usually done by the appointment of a receiver, and the administration of the property by the court through him, until the stockholders can reorganize into a new corporation or otherwise qualify themselves to take charge of the property in such a way as to protect the rights of the public and all others concerned.⁵⁰

The statute provides for a fine against the defendant in case of conviction. This is a mere formal provision which could only support a fine for a nominal amount, if for anything. Its constitutionality is

⁵⁰ *Railway Co. v. State*, 75 Texas, 434, 12 S. W., 690.

very doubtful even in case of nominal penalty, and to attempt to inflict under it any appreciable punishment would clearly be in violation of the Bill of Rights.⁵¹

Cases in Which This is Not the Proper Remedy.

This is not the proper action in which to attack the existence of a corporation when its regularity depends upon facts left to the determination of an extrajudicial tribunal which has decided the corporation to be lawful.⁵² Nor is it the proper method to determine which of two legally constituted officers is entitled to exercise a specified right or privilege, nor to prevent an officer from doing an act which he claims pertains to his office.⁵³ Nor to prevent a breach of contract nor give remedy for such breach, although the contract pertain to a public franchise.⁵⁴ Nor to raise questions as to the eligibility of a candidate for office which have been passed on by a city council in exercise of power given in the charter.⁵⁵ Nor to oust an officer, who has been declared elected, for alleged bribery in procuring the office.⁵⁶ Nor to prevent one from following a private business, though it take from the emoluments of a public office.⁵⁷

TRIAL OF RIGHT OF PROPERTY.

This is a summary proceeding given by the statute to one who claims to be the owner of personal property or to be entitled to the immediate and present possession of such property, against the plaintiff in a writ of execution, attachment, sequestration, or other writ which has been levied on the property, for the purpose of trying or having adjudged the rights of said claimant in said property and its liability to seizure under such writ. The method of procedure is given at length in the statutes.⁵⁸ To entitle to this remedy the claimant must be either the

⁵¹ State v. De Gress, *supra*.

⁵² State v. Goowin, 69 Texas, 55.

⁵³ State v. Smith, 55 Texas, 447.

⁵⁴ Morris et al. v. Leona et al., 67 Texas, 303.

⁵⁵ Seay v. Hunt, 55 Texas, 545.

⁵⁶ State v. Humphries, 74 Texas, 466.

⁵⁷ Watts v. State, 61 Texas, 184.

⁵⁸ Rev. Stats. 1895, title 107; Willis v. Thompson, 85 Texas, 301, 20 S. W., 155; Rodriguez v. Trevino, 54 Texas, 200.

owner or entitled to the immediate possession of the property.⁵⁹ It is not necessary that he have both these rights.⁶⁰

Neither a trustee whose trust estate was created after the levy,⁶¹ nor who was not in or entitled to the possession when the levy was made;⁶² nor a person, who is a party to the writ, and who sets up exemption of the property from execution, can avail himself of this remedy.⁶³

The remedy is cumulative to the common law action for damage,⁶⁴ but when the election is once made the party must abide it, and can not afterward prosecute his common law action.⁶⁵

The law requires the claimant to file with the sheriff or constable making the levy, an affidavit setting up his claim, and that it is made in good faith. This must be accompanied by a bond with sureties to be approved by the officer. When these papers are presented to the officer and approved by him, he must make the proper indorsements on the writ and return it to the court designated by statute, and deliver the property to the claimant. Thereafter the plaintiff in the writ must look to the claimant and the sureties on his bond for the production of the property or payment of its value. The property itself is no longer in the possession of the officer.⁶⁶ When the writ, its indorsements, the affidavit, and bond are filed in the court having jurisdiction, it is the duty of the clerk to enter the proceedings on the civil docket in their regular order, with the plaintiff in the writ as plaintiff and claimant in the affidavit as defendant.⁶⁷ The affidavit and bond are not pleading.⁶⁸ The pleadings are designated "issues," and are to be made up by the parties under the direction of the court.⁶⁹ They must show affirmatively the right of the plaintiff to seize and sell the

⁵⁹ Rev. Stats. 1895.

⁶⁰ *White v. Jacobs*, 66 Texas, 464, 1 S. W., 344.

⁶¹ *Saunders v. Ireland*, 87 Texas, 316, 27 S. W., 880.

⁶² *Garrity v. Thompson*, 64 Texas, 598; *Wilber v. Kray & Co.*, 73 Texas, 533, 11 S. W., 540.

⁶³ *Parker v. Portis*, 14 Texas, 166; *Walmsley v. Hubbard*, 24 Texas, 612.

⁶⁴ *Lang v. Dougherty*, 74 Texas, 228, 12 S. W., 29.

⁶⁵ *Vickery v. Ward*, 2 Texas, 212; *Howeth v. Mills*, 19 Texas, 295; *Carter v. Carter*, 36 Texas, 693; *Moore v. Gammel*, 13 Texas, 121; *Gabel v. Weisensee*, 49 Texas, 134; *Whitman v. Willis*, 51 Texas, 426.

⁶⁶ *Freiberg, Klein & Co. v. Elliott & Wright*, 64 Texas, 367.

⁶⁷ Rev. Stats. 1895, art. 5296; *Cobb v. Campbell*, 14 Texas Civ. App., 433, 38 S. W., 246.

⁶⁸ *Wright v. Henderson*, 10 Texas, 204; *Hamburg v. Wood*, 66 Texas, 168.

⁶⁹ Rev. Stats. 1895, art. 5298.

property, on the one hand,⁷⁰ and the nature of the defendant's claim, on the other.⁷¹

In the preparation of these issues, the parties should conform as nearly as possible to the rules of pleading,—fullness, conciseness, accuracy, and directness being as desirable here as in other cases. Neither the claim of the plaintiff nor the defenses of the claimant can go beyond those set out in the respective pleadings of the parties.⁷² This is illustrated in the cases denying to the claimant, in absence of express averment, the right to attack for fraud the judgment on which the writ issued.⁷³

There is sometimes manifested a tendency to looseness* in this character of cases which ought to be discountenanced both by the bench and by the bar. There is no good reason why the "issues" should not be as carefully prepared in these cases as in others, and the careful, diligent practitioner will find as much advantage from these qualities here as elsewhere.

If the plaintiff fails to appear and prosecute his case at the time and in the manner provided by the statute, his claim to have the property held or sold under his writ will be dismissed.⁷⁴

If, however, the plaintiff comes and tenders issues, and the defendant fails to do so, his claim in and title to the property will be denied.⁷⁵

⁷⁰ *Latham v. Selkirk*, 11 Texas, 314; *Cobb v. Campbell*, 14 Texas Civ. App., 433, 38 S. W., 246.

⁷¹ Rev. Stats. 1895, art. 5299; *McKinnon v. Reliance Co.*, 63 Texas, 30; *Choate v. McIlhenny Co.*, 71 Texas, 119, 9 S. W., 83.

⁷² *Huston v. Curl*, 8 Texas, 240.

⁷³ *Livingstone v. Wright*, 68 Texas, 706, 5 S. W., 407; *Saunders v. Ireland*, 27 S. W., 880.

⁷⁴ Rev. Stats. 1895, art. 5300.

⁷⁵ Rev. Stats. 1895, art. 5299; *Field v. Fowler*, 62 Texas, 68; *Martin v. Harnett*, 86 Texas, 517, 25 S. W., 1115.

CHAPTER XVI.

TRESPASS TO TRY TITLE.

Few, if any, legal questions are of more importance than those which relate to private rights in and ownership of land and the methods of vindicating and protecting them. The English tenures are largely feudal, and the common law real actions are among the most technical and cumbrous of all forms of procedure under that system. Many were the expedients resorted to and the fictions adopted to avoid in some measure the expense, delay, and hardships of these actions. Long prior to the adoption of the common law in Texas, the most common method of trying and determining rights and possessory titles to land was the action of ejectment. While this was not so inconvenient and technical as the actions which it superseded, it would seem to be sufficiently so to satisfy any longing in the professional mind in that direction. The method pursued was substantially as follows: A and B were adverse claimants to a parcel of land. A would imagine that he had leased the land to C, and C would imagine that he had been placed in possession by A. A and C would then jointly imagine that C had been dispossessed by D, and C would bring suit against D for the ouster. D would then imagine that he was the tenant of B and had possession from him, and would notify B that he (D) was only claiming as his tenant and would not defend the suit, but that he (B) must come in and defend it or judgment would go for A. B would then apply to the court for permission to come in and defend his possession, and the court would let him do so provided he would admit that C had leased the land from A, and had been placed in possession, and had then been ousted by D, and that D's justification in so doing was a lease under him (B). B would then be substituted for D as defendant, and the case would be tried between C as tenant of A and B in his own right, thus bringing up for adjudication the respective rights of A and B. A, however, was never nominally a party to the suit. If C recovered as A's tenant, it inured to A's benefit, but if C lost and A was not satisfied, all he had to do was to imagine that he had leased to another tenant, and get him to go through the same fictitious proceedings, and thus compel B to litigate again. This could be repeated indefinitely, and no judgment rendered against any one of A's tenants was *res judicata* against A.

As we have previously seen, the Congress of the Republic of Texas, though adopting the common law as the basis of all substantive

rights not directly regulated by the Constitution and by acts of Congress, was not willing to adopt the common law methods of procedure in ordinary litigation and the same policy prevailed as to land litigation, and we find that on the same day (February 5, 1840,) that the general practice act for the district court was passed that another was enacted which provides: "All fictitious proceedings in the action of ejectment are abolished and the method of trying titles to land, tenements, and other real property shall be the action of trespass to try title."¹ This article has never been repealed or amended, and is the exact language of the present statute.² Other portions of the original act have, however, been modified and some of its provisions have been entirely omitted. Following out the idea that the plaintiff in ejectment was not to be bound by the judgment rendered against his tenant, the act of 1840 allowed the unsuccessful plaintiff to bring another or second suit, provided it were begun within one year after the final determination of the first. With some modifications this continued to be the law until the revision of 1879, when it was omitted and in its stead it was declared that the judgment in the first suit should be *res judicata* against the plaintiff as well as the defendant.³

The present statute on the subject is as follows:

"Art. 5248. All fictitious proceedings in the action of ejectment are abolished, and the method of trying titles to land, tenements, or other real property shall be by action of trespass to try title.

"Art. 5249. The trial shall be conducted according to the rules of pleading, practice, and evidence in other cases in the district court, and conformably to the principles of trial by ejectment, except as herein otherwise expressly provided.

"Art. 5250. The petition shall state—

"1. The real names of the plaintiff and defendant and their residence, if known.

"2. It shall describe the premises by metes and bounds, or with sufficient certainty to identify the same, so that from such description possession thereof may be delivered, and shall also state the county or counties in which the same is situated.

"3. The interest which the plaintiff claims in the premises, whether it be a fee simple or other estate; and if he claims an undivided interest he shall state the same and the amount thereof.

"4. That he was in possession of the premises or entitled to such possession.

"5. That the defendant afterward unlawfully entered upon and

¹ Acts 1840, p. 136; Gammel Laws of Texas, vol. 2, p. 310.

² Rev. Stats. 1895, art. 5248.

³ Acts of 1840, p. 137; Rev. Stats. 1879, art. 4811; 1895, art. 5275.

dispossessed him of such premises (stating the date), and withholds from him possession thereof.

"6. If rents and profits or damages are claimed, such facts as show the plaintiff to be entitled thereto and the amount thereof.

"7. It shall conclude with a prayer for the relief sought.

"Art. 5251. The plaintiff shall indorse on his petition that the action is brought as well to try the title as for damages.

"Art. 5252. When a party is sued for land the real owner or warrantor may make himself or may be made a party defendant in the suit, and shall be entitled to make such defense as if he had been the original defendant in the action.

"Art. 5253. When such action shall be commenced against a tenant in possession the landlord may enter himself as defendant or he may be made a party on motion of such tenant, and he shall be entitled to make the same defense as if the suit had been originally commenced against him.

"Art. 5254. The defendant in the action shall be the person in possession if the premises are occupied, or some person claiming title thereto in case they are unoccupied.

"Art. 5255. The plaintiff may join as a defendant with the person in possession, any other person who, as landlord, remainderman, reversioner, or otherwise, may claim title to the premises or any part thereof adversely to the plaintiff.

"Art. 5256. The defendant in such actions may file only the plea of 'not guilty,' which shall state in substance that he is not guilty of the injury complained of in the petition filed against him, except that if he claims an allowance for improvements he shall state the facts entitling him to the same as provided in the succeeding chapter.

"Art. 5257. Under such plea of 'not guilty' the defendant may give in evidence any lawful defense to the action, except the defense of limitation, which shall be specially pleaded.

"Art. 5258. Such plea or any other answer to the merits shall be an admission by the defendant, for the purpose of that action, that he was in possession of the premises sued for, or that he claimed title thereto at the time of commencing the action, unless he states distinctly in his answer the extent of his possession or claim, in which case it shall be an admission to such extent only.

"Art. 5259. All certificates for headright, land scrip, bounty warrant, or any other evidence of right to land recognized by the laws of this State which have been located and surveyed shall be deemed and held as sufficient title to authorize the maintenance of the action of trespass to try title.

"Art. 5260. After answer filed, either party may, by notice in writing, duly served on the opposite party or his attorney of record, not less than ten days before the trial of the cause, demand an abstract

in writing of the claim or title to the premises in question upon which he relies.

"Art. 5261. Such abstract of title shall be filed with the papers of the cause within twenty days after the service of the notice, or within such further time as the court on good cause shown may grant; and in default thereof no evidence of the claim or title of such opposite party shall be given on trial.

"Art. 5262. The abstract mentioned in the two preceding articles shall state—

"1. The nature of each document or written instrument intended to be used as evidence, and its date; or,

"2. If a contract or conveyance, its date, the parties thereto, and the date of the proof or acknowledgment, and before what officer the same was made; and,

"3. Where recorded, stating the book and page of the record.

"4. If not recorded in the county when the trial is had, copies of such instrument, with the names of the subscribing witnesses, shall be included.

"If such unrecorded instrument be lost or destroyed, it shall be sufficient to state the nature of such instrument and its loss or destruction.

"Art. 5263. The court may allow either party to file an amended abstract of titles, under the same rules which authorize the amendment of pleadings so far as they are applicable; but in all cases the documentary evidence of title shall, at the trial, be confined to the matters contained in the abstract of titles.

"Art. 5264. The presiding judge of the court may, either in term time or vacation, at his own discretion, or on motion of either party to the action, appoint a surveyor, who shall survey the premises in controversy pursuant to the order of the court, and report his action under oath to such court; and if the said report be not rejected for good cause shown, the same shall be admitted as evidence on the trial.

"Art. 5265. Where there is no dispute as to the lines or boundaries of the land in controversy, or where the defendant admits that he is in possession of the lands or tenements included in the plaintiff's claim or title, an order of survey shall be unnecessary.

"Art. 5266. It shall not be necessary for the plaintiff to deraign title beyond a common source, and proof of a common source may be made by the plaintiff by certified copies of the deeds showing a chain of title to the defendant emanating from and under such common source; but before any such certified copies shall be read in evidence they shall be filed with the papers of the suit three days before the trial, and the adverse party served with notice of such filing as in other cases; provided, that such certified copies shall not be evidence of title

in the defendant unless offered in evidence by him, and the plaintiff shall not be precluded from making any legal objection to such certified copies or the originals thereof when introduced by the defendant.

"Art. 5267. If the defendant, who has been personally served with citation according to law, fails to appear and answer by himself or attorney within the time prescribed by law for other actions in the district court, the proper judgment by default may be entered against him and in favor of the plaintiff for the title to the premises or the possession thereof, or for both, according to the petition, and for all costs, without any proof of title to the plaintiff.

"Art. 5268. If the defendant has been cited only by publication, and fails to appear and answer by himself, or by attorney of his own selection, or if any defendant having answered, fails to appear by himself or attorney when the case is called for trial on its merits, the plaintiff shall make such proof as will entitle him *prima facie* to recover, whereupon the proper judgment shall be entered.

"Art. 5269. Where the defendant claims part of the premises only, the answer shall be equivalent to a disclaimer of the balance.

"Art. 5270. Where the defendant claims the whole premises, and the plaintiff shows himself entitled to recover part, the plaintiff shall recover such part and costs.

"Art. 5271. When there are two or more plaintiffs or defendants, any one or more of the plaintiffs may recover against any one or more of the defendants the premises or any part thereof, or any interest therein, or damages, according to the rights of the parties.

"Art. 5272. Upon the finding of the jury, or of the court where the case is tried by the court, in favor of the plaintiff for the whole or any part of the premises in controversy, the judgment shall be that the plaintiff recover of the defendant the title or possession, or both, as the case may be, of such premises, describing them, and, where he recovers the possession, that he have his writ of possession.

"Art. 5273. Where it is alleged and proved that one of the parties is in possession of the premises the court or jury, if they find for the adverse party, shall assess the damages for the use and occupation of the premises, and if special injury to the property be alleged and proved, the damages for such injury shall also be assessed, and the proper judgment shall be entered therefor, on which execution may issue, but damages shall not be assessed under this article for use and occupation or for injuries done over two years prior to the commencement of the suit.

"Art. 5274. When the defendant or person in possession has claimed an allowance for improvements in accordance with the provisions of the succeeding chapter, the claim for use and occupation and damages mentioned in the preceding article shall be considered and acted on in connection with such claim by the defendant or person in possession.

"Art. 5275. Any final judgment rendered in any action for the recovery of real estate hereafter commenced shall be conclusive as to the title or right of possession established in such action upon the party against whom it is recovered, and upon all persons claiming from, through, or under such party, by title arising after the commencement of such action.

"Art. 5276. Nothing under this title shall be so construed as to alter, impair or take away the right of parties, as arising under the laws in force before the introduction of common law, but the same shall be decided by the principles of the law, or laws under which the same accrued, or by which the same were regulated or in any manner affected.

"Art. 5277. The defendant in any action of trespass to try title may allege in his pleadings that he and those under whom he claims have had adverse possession in good faith of the premises in controversy for at least one year next before the commencement of such suit, and that he and those under whom he claims have made permanent and valuable improvements on the lands sued for during the time they have had such possession, stating the improvements and their value respectively, and stating also the grounds of such claim.

"Art. 5278. Where the defendant has filed his claim for allowance for improvements in accordance with the preceding articles, if the court or jury find that he is not the rightful owner of the premises sued for, but that he and those under whom he claims have made permanent and valuable improvements thereon, being possessors thereof in good faith, the court or jury shall at the same time estimate from the testimony—

"1. The value at the time of trial of such improvements as were so made before the filing of the suit, not exceeding the amount to which the value of the premises is actually increased thereby.

"2. The value of the use and occupation of the premises during the time the defendant was in possession thereof (exclusive of the improvements thereon made by himself or those under whom he claims) and also, if authorized by the pleadings, the damages for waste or other injury to the premises committed by him, not computing such annual value for a longer time than two years before suit, nor damages for waste or injury done before said two years.

"3. The value of the premises without the improvements made as aforesaid.

"Art. 5279. If the sum estimated for the improvements exceeds the damages estimated against the defendant and the value of the use and occupation as aforesaid, there shall then be estimated against him, if authorized by the testimony, the value of the use and occupation and the damages done by him or those under whom he claims, for any time before the said two years, so far as may be

necessary to balance the claim for improvements, but no further; and he shall not be liable for the excess, if any, beyond the value of the improvements.

"Art. 5280. If it shall appear from the finding of the court or jury, under the two preceding articles, that the estimated value of the use and occupation and damages exceed the estimated value of the improvements, judgment shall be entered for the plaintiff for the excess and costs in addition to a judgment for the premises; but should the estimated value of the improvements exceed the estimated value of the use and occupation and damages, judgment shall be entered for the defendant for the excess.

"Art. 5281. In any action of trespass to try title when the lands or tenements have been adjudged to the plaintiff, and the estimated value of improvements in excess of the value of the use and occupation and damages has been adjudged to the defendant, no writ of possession shall be issued for the term of one year after the date of the judgment, unless the plaintiff shall pay to the clerk of the court for the defendant the amount of such judgment in favor of the defendant, with interest thereon.

"Art. 5282. If the plaintiff shall neglect for the term of one year to pay over the amount of said judgment in favor of the defendant, with interest thereon, as directed in the preceding article, and the defendant shall, within six months after the expiration of said year, pay to the clerk of the court for the plaintiff the value of the lands or tenements without regard to the improvements, as estimated by the court or jury, then the plaintiff shall be forever barred of his writ of possession, and from ever having or maintaining any action whatever against the plaintiff, his heirs or assigns, for the lands or tenements recovered by such suit.

"Art. 5283. If the defendant or his legal representative shall not, within the six months aforesaid, pay over to the clerk for the plaintiff the estimated value of the lands or tenements, as directed in the preceding article, then the plaintiff may sue out his writ of possession as in ordinary cases.

"Art. 5284. The judgment or decree of the court shall recite the estimated value of the premises without the improvements, and shall also include the conditions, stipulations, and directions contained in the three preceding articles, so far as they may be applicable to the case before the court.

"Art. 5285. Whenever payments shall be made to the clerk of the court by the plaintiff or defendant, as provided in the preceding articles, it shall be the duty of such clerk to enter a memorandum of such payment, with the date thereof, on the page of the record on which the judgment was entered; and he shall, on demand, pay over the money

to the party entitled, taking his receipt therefor, dated and signed on the page of the record aforesaid."

Concerning the effect of these statutes the Supreme Court has used the following language: "The most marked changes made on this subject by the Revised Statutes are these:

"1. The provisions for a second suit by the plaintiff (Paschal's Digest, articles 5298, 5299,) are abolished, and the plaintiff and defendant are placed on the same footing, making the first judgment final, etc. Art. 4811, Rev. Stats.

"2. Plaintiff may recover for use and occupation, and for damages where the right of action to recover such rents and damages accrued within two years prior to the suit.

"3. The provisions relating to the payment of taxes, and the proof thereof (article 5306, Paschal's Digest), are abolished, as the question of payment and collection of taxes should be left alone to the tax laws of the State.

"4. The assessment of the value of the use and occupation is required to be exclusive of the improvements made by the defendant. Art. 4814, Rev. Stats.

"5. The articles authorizing either party to require of the other to file an abstract of the title relied upon are supplied. Report of Com. Rev. Stats., p. 32.

"There are also to be found a few other verbal alterations, not important enough to require notice."⁴

NATURE AND SCOPE OF THE ACTION.

The Supreme Court of the State has said:⁵ "Our action of trespass to try title is intended to serve all the purposes of an action of ejectment as known to the law of England and other States. Wherever ejectment will lie at common law, trespass to try title may be used under our statutes. It is in its nature a suit to recover possession of land unlawfully withheld from the owner and to which he has the right of immediate possession. It is not important so far as the right to the action is concerned whether the defendant is upon the property under a claim of title or is a naked trespasser. It is enough that he is there without authority. If the defendant is not in possession, then he must set up a claim to the land in order to justify the proceeding; but if in possession, how he came there becomes unimportant if the occupancy is illegal. This is the rule in actions of ejectment and

⁴ Sowers v. Peterson, 59 Texas, 221.

⁵ Hays v. Railway Co., 62 Texas, 397.

is to be inferred from the very language of our statutes regulating the action of trespass to try title."

From the statutes and decisions we may say that the action of trespass to try title is: A statutory action in which anyone having title to real estate, which entitles him to the immediate possession thereof, may establish such right and secure the enjoyment of it against anyone adversely in possession thereof or adversely asserting title or claim thereto; and in which damages for use and occupation thereof and for waste may be recovered; and in which compensation for permanent and valuable improvements made on the land, in good faith, by the party in possession or his privies in estate may be allowed.

PLAINTIFF'S PLEADINGS.

By reference to the statute above quoted it will be seen that the provisions as to pleading in this action are very simple. The marginal venue, term of court, address, and commencement are just the same as in other cases, and the rules governing the statement of the cause of action are the same; that is, the plaintiff must show his right in the thing sued for, and the defendant's violation of that right; from this the law will presume some damage, and would entitle him to recover the land, nominal damages, and costs. If the plaintiff desires further damages for use and occupation or injury to the property, he must set up the facts on which his claims are based, the amount he demands, and conclude with appropriate prayer for relief.

Judge Gould, in *Bridges v. Cundiff*,⁶ speaking of the petition in that suit and its sufficiency, says: "In May, 1859, Jackson and James Bridges filed their petition alleging themselves to be the legal and rightful owners of an equal undivided half of a certain league and labor of land, and that on April 9, 1856, they were legally seized of and possessed of the same; that afterwards, on the day last named, Jesse Dusen, who is made defendant, set up some claim thereto, disturbed their peaceful possession, and from that time kept petitioners from the possession thereof. They prayed judgment for possession; that the cloud cast on their title by Dusen's claim be removed; that their interest in said land be set apart to them by partition; their title quieted and for general relief." * * * "Enough of the original petition has been given to show that it contained all the essentials of an action of trespass to try title."

In *Evans v. Womack*,⁷ Judge Roberts says: "The exception to the

⁶ *Bridges v. Cundiff*, 45 Texas, 440.

⁷ *Evans v. Womack*, 48 Texas, 230.

petition was general. The objection raised in the assignment of error is that it fails to allege that the plaintiff was the owner of the land in controversy at the date of the institution of the suit. The words of the petition are as follows, to wit: 'Plaintiff alleges that on the 18th day of January, A. D. 1873, he was lawfully seized and possessed of the tract of land hereinafter described, situated in said county of Hopkins, holding the same in fee simple; that on the 12th day of March, 1875, defendant entered upon said premises, and ejected plaintiff therefrom, and unlawfully withholds from the plaintiff the possession thereof, to his damage five hundred dollars; that the premises so entered upon, and unlawfully withheld by defendant from plaintiff, are bounded and described as follows, to wit,' etc. The indorsement on the petition shows that it is an action of trespass to try title, which is a form of action substituted by our statute for the action of ejectment. The suit was brought on the 12th of August, 1875.

"If the plaintiff, as he says, was seized of the land in fee simple on the day before the suit was brought, and defendant dispossessed him, and unlawfully withheld the possession from him, to his damage five hundred dollars, it follows, by reasonable intendment from this mode of expression, that plaintiff continued to be the owner of the premises up to the time of bringing the suit, and that is certainly sufficient on general exception. Besides, this is a mere form of action, the only one prescribed in our system of pleading; and to show when it is designed to be used as a form only, substituted for an action of ejectment to try the title to the land, the statute requires the attorney to indorse on the petition that the action is brought to try the title as well as for damages, which was done in this case.

"The form of the action of trespass *quare clausum fregit*, as given in Stephens on Pleading, is as follows, to wit: 'For that the said defendant, heretofore, to wit, on the — day of —, A. D. —, with force and arms, broke and entered the close of said plaintiff, called —, situate,' etc. (Page 39.)

"This might be subjected to the criticism that the close might have belonged to the plaintiff heretofore, and not then when the suit was brought.

"If this were not merely a form of action to try the title, but in it the plaintiff was required, as he is in other actions, to state the facts constituting his cause of action, still it is not a sort of pleading, under any known system, that is required to be 'certain, to a certain intent, in every particular,' accordingly as these terms are understood in pleading at common law."⁸

* See also *Rains v. Wheeler*, 76 Texas, 390, 13 S. W., 324.

These cases show that no technical niceties are to be observed in passing on the petition. Still it may be well to consider the several sections of the statute relating to the setting out of the cause of action, and ascertain what construction has been placed upon them. The changes of importance made in this action by the revision of 1879 are enumerated in *Sowers v. Peterson*,⁹ which should be carefully consulted.

Description of Land.

First in order is the requirement as to the description of the premises. It is as follows: "It [the petition] shall describe the premises by metes and bounds or with sufficient certainty to identify same, so that from such description possession thereof may be delivered, and shall also state the county or counties in which the same is situated."^{9a}

The description of the land sued for should be so specific and certain that there can be no doubt as to the exact parcel claimed. This description must form a proper basis first, for proof of the exact land sued for; second, for the proper description in the judgment; and third, for similar description in the writ of possession which the court may order issued. It should not be indefinite, leaving the parties charged with the responsibility of trying the case and carrying out the judgment in doubt as to the identity of the thing with which they have to deal. It has been held that this may be done by reference to deeds which describe the land properly, but this is not good practice.¹⁰

In cases in which the description in the title papers is accurate and the calls consistent and correct, there can be but little difficulty in inserting this description in the petition. When this is not the case, and the calls in the title papers are doubtful, or the objects called for therein are not to be found as set out, either because of original error or because of subsequent change, so that the land really claimed and sought to be recovered does not at the time the suit is brought accurately correspond with the description in the title papers, the petition should properly and accurately describe the land by the field notes and calls as they then exist, so that it may be readily identified by the calls in the petition, and should further allege that this is the true and correct description of the land owned by the plaintiff and described in his title deeds, making the necessary statements and

⁹ 59 Texas, 221.

^{9a} Rev. Stats. 1895, art. 5250, clause 2.

¹⁰ *Steinbeck v. Stone*, 53 Texas, 385; *Curtis v. Douglas*, 79 Texas, 167, 15 S. W., 154.

explanations to show the identity of the two tracts thus differently described.¹¹

When the defendant claims or is in possession of only a portion of the tract owned by the plaintiff, it is better practice for the plaintiff to describe and sue for only the part in dispute, so that if the defendant should plead not guilty and by any unforeseen circumstance the plaintiff should fail to recover, he would not jeopardize the title to the undisputed balance of the land. This can be done without difficulty, as it has been repeatedly held that if suit is brought for a tract of land properly described, the petition may be sustained by proof of title to a larger tract including that sued for, and that no objection to the testimony on account of variance can be sustained on this ground.

A petition claiming in severalty an undescribed portion of a designated tract, as three hundred and twenty-seven acres, part of a six hundred and forty acre survey, is bad. If it claimed an undivided interest equal to so many acres, the petition might possibly be good.¹²

A misdescription of the land in the petition may be cured by amendment as other defects.¹³

Plaintiff's Interest.

The next requirement is that the petition should show "the interest which the plaintiff claims in the premises, whether it be fee simple or some other estate; and if he claims an undivided interest he shall state the same and the amount thereof."¹⁴

This does not mean that the plaintiff shall plead the facts which evidence his title, nor how or through whom same was acquired, but that he shall allege his estate as it exists,—thus, if he claims a fee simple, he shall so aver; if a leasehold, he shall allege that fact.¹⁵

Prior to the revision of 1879, when the language above quoted was first adopted, it was held in many cases that one owning only an undivided interest in land could sue alleging ownership generally in himself, and recover on proof of his undivided interest.¹⁶

The most obvious construction of this statute would seem to change

¹¹ *Roche v. Lovell*, 74 Texas, 191, 11 S. W., 1079; *Gray v. Kaufman*, 82 Texas, 48, 17 S. W., 513.

¹² *Halley v. Fontaine*, 33 S. W., 260.

¹³ *Hunter v. Morse*, 49 Texas, 219.

¹⁴ Rev. Stats. 1895, art. 5250, clause 3.

¹⁵ *Parks v. Caudle*, 58 Texas, 216.

¹⁶ *Hutchins v. Bacon*, 46 Texas, 414; *Croft v. Rains*, 10 Texas, 523; *Watrous v. McGrew*, 16 Texas, 510; *Grassmeyer v. Beeson*, 18 Texas, 766; *Read v. Allen*, 56 Texas, 176.

this rule, and this was intimated in one case which came up soon after the passage of the law, but which did not directly involve the point.¹⁷ When, however, the question was presented for actual adjudication the court took the opposite view and held that the revision made no change in the old rule. This decision has been followed continuously since.¹⁸

The title need not be a fee simple; the plaintiff can maintain this action on a lease for years or other estate less than a fee, if the other necessary facts concur.¹⁹

While it is true that the plaintiff is not required to plead his title specifically, but can under the general allegation of ownership prove any facts which constitute title in himself, still if he elects to set up the title under which he claims, these specific allegations will limit and control the general averments; if the specific allegations are not legally sufficient to show that the plaintiff is the owner, the petition will be bad on demurrer; and if they do show title in him, then he must prove and recover on the very facts alleged, and any material variance from them will be fatal.²⁰ A careful attorney will seldom find it desirable to set up the particular facts, but will rest upon the general allegations of title.

Possession by the Plaintiff.

The next allegation specified by the statute is "that he (the plaintiff) was in possession of the premises or was entitled to such possession."

In the case of the Day Land and Cattle Company²¹ against the State, there were no averments of possession or right to possession by the State, which was plaintiff below. A special demurrer was urged on that account. The Supreme Court says: "The petition alleged that the lands belonged to the State; that they are claimed by the defendant, and gives the origin and nature of the claim thus asserted. It prays for general relief, and that the patents under which the defendant claims be canceled, and the cloud thereby placed on the State's title it asks to have removed. The first, second, and third requirement

¹⁷ *Sowers v. Peterson*, 59 Texas, 216.

¹⁸ *Pilcher v. Kirk*, 60 Texas, 162; *Ryan v. Porter*, 61 Texas, 106; *Schmidt v. Talbert*, 74 Texas, 451, 12 S. W., 284; *Murrell v. Wright*, 78 Texas, 519, 15 S. W., 156.

¹⁹ *Thurber v. Connors*, 57 Texas, 96.

²⁰ *Hughes v. Lane*, 6 Texas, 289; *Turner v. Ferguson*, 39 Texas, 505; *Pilcher v. Kirk*, 55 Texas, 208; *Montgomery v. Carlton*, 56 Texas, 361; *Edwards v. Barwise*, 69 Texas, 84, 6 S. W., 677; *Macdonald v. Bank*, 74 Texas, 539, 12 S. W., 233.

²¹ *Day Land and Cattle Co. v. State*, 68 Texas, 526, 4 S. W., 865.

in a petition are fully complied with. The petition states facts which, if the grants through which the defendant claims are invalid, entitle the State to the possession, and that there was not an averment, in terms, that the State was so entitled, is a matter of no importance." This is referred to with approval in *Tevis v. Armstrong*.²²

Wrong by the Defendant.

"That the defendant afterward unlawfully entered upon and dispossessed him of such premises (stating the date), and withholds from him the possession thereof."

This language seems mandatory and hence it might readily be concluded that unless the averment of ouster of plaintiff by defendant was made the suit could not be the statutory action of trespass to try title, but the decisions do not bear out this construction. On the contrary they hold that a constructive ouster, so to speak, by asserting adverse claim to the land, though unaccompanied by actual possession by the defendant, is sufficient.²³ The petition must, however, contain one or the other or both of these charges.²⁴

Rents and Profits, and Damages.

"If rents and profits or damages are claimed, such facts as show the plaintiff to be entitled thereto and the amount thereof."

The allegations as to the ownership by the plaintiff and ouster and possession by the defendant, of course, need not be repeated in connection with the claim for damages. This clause only requires appropriate additional allegations as to the reasonable rental value of the land, and facts constituting waste, etc.; the general damages resulting from the invasion of the premises need not be specially alleged, but it is well to be specific as to particular injuries.

In *Biencourt v. Parker*²⁵ the plaintiff alleged ouster by the defendants on August 1, 1852, and then alleged "that the defendants had ever since continued such wrongful possession, taking and receiving the fruits and profits of the land to the value of one thousand dollars by the year, and other wrongs then and there did, to the damage of your

²² *Tevis v. Armstrong*, 71 Texas, 62, 9 S. W., 134.

²³ *Day Land and Cattle Co. v. State*, 68 Texas, 526, 4 S. W., 865; *Rains v. Wheeler*, 76 Texas, 390, 13 S. W., 324; *Moody v. Halcomb*, 26 Texas, 719; *Titus v. Johnson*, 50 Texas, 237; *Edrington v. Butler*, 33 S. W., 143.

²⁴ *Nye v. Hawkins*, 65 Texas, 600; *Heath v. Bank*, 32 S. W., 778.

²⁵ *Biencourt v. Parker*, 27 Texas, 558.

petitioner five hundred dollars." Prayer was for "their damages aforesaid, mesne profits, and costs of suit," etc.

There was verdict and judgment for the plaintiff for one-half of the land and six hundred dollars damages. In passing on the question of damages the Supreme Court says:

"The petition alleges the use and occupation of the premises in dispute to be of the yearly value of one thousand dollars, and also charges damages by reason of the wrongful and forcible possession taken thereof by the defendants. The prayer for judgment in the petition embraces both of these grounds. Mesne profits are recoverable in actions of this kind, which are brought as well to try title as to recover damages, as a part of the plaintiff's damages. That they are not so called in direct terms in the petition, is no reason why they should not be thus denominated in the verdict, and it should not on this account be set aside, when the testimony, as in this case, shows the amount of the money verdict was not larger than the plaintiff was entitled to recover."

In the case of *Ammons v. Dwyer*,²⁶ the plaintiff charged a trespass by the defendant resulting in her damage five thousand dollars. The defendant plead improvement in good faith. In submitting the case to the jury, the judge instructed them to allow rents, in connection with the claim for improvements. To this the defendant objected because the plaintiff's petition did not ask for rents. The court held that the pleadings taken together were sufficient to justify the submission of the issue and sustained the judgment.

*O'Conner v. Luna*²⁷ was an action of trespass to try title in regular form. The defendant plead "not guilty." No evidence of actual occupancy by the defendant was offered. The lower court held the effect of the statutory plea of "not guilty" was an admission by the defendant of actual occupancy, and gave judgment for the rent of the land pending the litigation. The Supreme Court reviewed the statutes on the subject, and held as follows: "We think the necessary construction of these provisions is that the admission of possession by the answer authorizes only a recovery of the title and possession of the land, but that damages for the use and occupancy of the premises can be recovered only when the facts authorizing such recovery are alleged and proved as other issues are required to be."

Indorsement on Petition.

In addition to the indorsement required on other original petitions showing the style and number of the case, the name of the pleading,

²⁶ *Ammons v. Dwyer*, 78 Texas, 639, 15 S. W., 1049.

²⁷ *O'Conner v. Luna*, 75 Texas, 592, 12 S. W., 1125.

date of filing, etc., the statute requires the plaintiff in trespass to try title to indorse thereon "that the action is brought as well to try title as for damages." This requirement is a matter of form, and its omission can not be reached by general demurrer or objection to testimony or motion in arrest of judgment, or for the first time on appeal.²⁸ If it is pointed out by special exception, the exception should be sustained, but failure to do so unaccompanied by other error will not necessitate or justify a reversal.²⁹

Joinder of Other Causes of Action With This.

In this action the plaintiff may join a prayer for partition provided he have all necessary parties before the court, and make the proper allegations.³⁰

So also of foreclosure liens. If the plaintiff have a conveyance of the land sued for from the defendant, which the plaintiff claims to be a deed, but which he knows the defendant insists is a mortgage, the plaintiff can sue in trespass to try title for the land, and in addition can set out the facts entitling him to foreclose the mortgage, in the event the court shall find the instrument to be a mortgage, and pray in the alternative for foreclosure.³¹

DEFENDANT'S PLEADINGS.

The defendant in this action may file only the plea of "not guilty," which shall state in substance that he is not guilty of the injury complained of in the petition filed by the plaintiff against him.³² Under this plea of not guilty the defendant may give in evidence any lawful defense to the action except the defense of limitation, which shall be specially plead. Nor can he under such plea secure compensation for improvements made in good faith.³³

Such plea or any other answer to the merits shall be an admission by the defendant; for the purpose of that action, that he was in possession of the premises sued for, or that he claimed title thereto at

²⁸ Shannon v. Taylor, 16 Texas, 413; Day v. State, 68 Texas, 526, 4 S. W., 865.

²⁹ Bradley v. Deroche, 70 Texas, 465, 7 S. W., 779.

³⁰ Bridges v. Cundiff, 45 Texas, 443.

³¹ Mann v. Falcon, 25 Texas, 276; Mabry v. Birge, 44 Texas, 283; Nye v. Gribble, 70 Texas, 461, 8 S. W., 608.

³² Rev. Stats., art. 5256.

³³ Rev. Stats., art. 5257.

the time of the commencement of the suit, unless he states distinctly in his answer the extent of his possession or claim, in which case it shall be an admission of such extent only.³⁴

The changes in the general rules of defensive pleadings made by these articles are very great. They do away with all distinctions between general denials and pleas in confession and avoidance and of estoppel, and permit the defendant to prove and avail himself of any defensive matter of whatever character, except limitation and improvements in good faith under the general denial.

To overcome this plea the plaintiff must make out a case of right in himself at the time of the institution of the suit. He can not maintain his suit by proof of a subsequently acquired title.³⁵ A seeming though not real exception to this last statement exists in cases in which at the institution of the suit the plaintiff had an equitable title which he perfects during the litigation. In such case he can recover on the perfected title.³⁶ In other instances if the plaintiff wishes to have the benefit of a title acquired after the suit was begun, he must amend and set up the new title, thereby practically beginning a new suit.³⁷

The recovery must always be based on the strength of the plaintiff's title and not on the weakness of the defendant's claim.³⁸ This title may be either legal or equitable.³⁹

The plaintiff's title may be made out by regular claim of transfer from the sovereignty of the soil, by deraigning from a common source and showing the superiority of the title asserted,⁴⁰ by actual prior possession,⁴¹ or by title made out by compliance with the requirements of

³⁴ Rev. Stats. 1895, art. 5258.

³⁵ *Teal v. Terrell*, 48 Texas, 491; *Collins v. Ballow*, 72 Texas, 330, 10 S. W., 248; *Ballord v. Carmicheal*, 83 Texas, 355, 18 S. W., 734; *Bradford v. Hamilton*, 7 Texas, 58; *Givens v. Davenport*, 8 Texas, 458.

³⁶ *Ballard v. Perry*, 28 Texas, 348.

³⁷ *Rucker v. Dailey*, 66 Texas, 284, 1 S. W., 316; *Paston v. Blanks*, 77 Texas, 330, 14 S. W., 67.

³⁸ *Devine v. Keller*, 73 Texas, 364, 11 S. W., 379; *Hughes v. Lane*, 6 Texas, 289; *Byers v. Wallace*, 87 Texas, 503, 29 S. W., 760; *Barnes v. McArthur*, 4 Texas Civ. App., 71, 27 S. W., 770.

³⁹ *Walker v. Howard*, 34 Texas, 478; *Miller v. Alexander*, 8 Texas, 43; *Viser v. Rice*, 33 Texas, 139; *Titus v. Johnson*, 50 Texas, 224; *Wright v. Dunn*, 73 Texas, 293, 11 S. W., 330.

⁴⁰ Rev. Stats. 1895, art. 5266; *Ogden v. Bosse*, 86 Texas, 337; *Glover v. Thomas*, 75 Texas, 506, 12 S. W., 684; *Keys v. Mason*, 44 Texas, 140; *Cooke v. Avery*, 145 U. S., 376; *Burns v. Goff*, 79 Texas, 236, 14 S. W., 1009.

⁴¹ *Lea v. Hernandez*, 10 Texas, 137; *Wilson v. Palmer*, 18 Texas, 592; *Alexander v. Gilliam*, 39 Texas, 227; *Parker v. Railway Co.*, 71 Texas, 132, 8 S. W., 541; *Railroad Co. v. Ragsdale*, 67 Texas, 24, 2 S. W., 515.

either the three, five, or ten years statutes of limitation,⁴² or by proof of the tenancy of the defendant under the plaintiff and refusal to surrender it at the end of the term;⁴³ or against a naked trespasser by proof of prior peaceable possession.

Admission by the Defendant Involved in Pleading Not Guilty.

To understand the effect of this plea as an admission on part of defendant, the history of our legislation on the subject must be considered.

The Act of 1840 which abolished the common law action of ejectment did not introduce the plea of not guilty by the defendant, but on the contrary declared that if "the defendant set up title to the land or to any part thereof, either by possession or otherwise, he should be required to plead the same, and in the plea should set out the land claimed by him by metes and bounds with the same precision as the plaintiff was required to do."

The act further provided that the plaintiff should not be required to prove an actual trespass on the part of the defendant to support his case.⁴⁴

The first change of this law was by Act of February 2, 1844, which was primarily designed to better regulate the matter of improvements in good faith. In it the defendant was given the privilege of pleading simply "not guilty," and under that to try all issues both as to title and improvements. This was the first statutory recognition of this plea. These statutes were in force in 1866, when *Stroud v. Springfield*⁴⁵ was decided. In that case it was contended that the plea of "not guilty" relieved the plaintiff from the burden of proving that the defendant was on the land, and put upon the defendant the burden of proving that he was not. In discussing the question the court says: "It is a proposition that can not be disputed, that a naked possessor of land is entitled to hold it until a perfect title is proved against him. The claimant or plaintiff must prove the title under which he claims, and must also prove that the land described in his petition is the same possessed by the defendant, unless he is relieved by the pleading or admission of the de-

⁴² Rev. Stats. 1895, art. 3347; *Pierson v. Burditt*, 26 Texas, 157; *Spofford v. Bennett*, 55 Texas, 293; *Branch v. Baker*, 70 Texas, 190, 7 S. W., 808; *Mims v. Rafel*, 73 Texas, 300, 11 S. W., 277; *McGregor v. Thompson*, 7 Texas Civ. App., 32, 26 S. W., 649.

⁴³ *Tyler v. Davis*, 61 Texas, 674; *McKie v. Anderson*, 78 Texas, 207, 14 S. W., 576; *Lamb v. Temperance Hall*, 2 Texas Civ. App., 289, 21 S. W., 713; *Hall v. Haywood*, 77 Texas, 4, 26 S. W., 649.

⁴⁴ Act of 1840, pp. 136, 137; 2 Gammel Laws, pp. 310, 311.

⁴⁵ *Stroud v. Springfield*, 28 Texas, 649.

fendant from so doing. Such is the common law rule in actions of ejectment. *Adams, Eject.*, par. 277; *Greaves v. Ruby*, 2 B. & A., 948; *Pope v. Pendergrast*, 1 Marsh., 133.

"In this case the defendant plead 'not guilty,' and the fifth section of the act of February 2, 1844 (O. & W. Dig., art. 2051), provides that they shall not be required to put in any other plea. By this plea they admit nothing, but demand strict proof of everything necessary to sustain the plaintiff's action. If this plea be construed to admit the identity of the land in their possession with that claimed and described in plaintiff's petition, and only to put in issue the title (the idea on which this instruction is based), it would, in effect, be to require the defendants, in order to avail themselves of the full measure of the defense relied on, to plead it specifically, in express contravention of the statute, which provides that they shall not be required to put in any other plea than the one of not guilty.

"The sixth section of the Act of 1840 (O. & W. Dig., art. 2042), which provides that it shall not be necessary to prove an actual trespass on the part of the defendant in order to maintain actions of this character, is cited by appellant's counsel as establishing the propriety of this instruction, and the error of the court in refusing it. We are of the opinion that it does not have this effect.

"By the Act of 1840, the common law action of ejectment, with its fictions, was abolished, and the present form of action of trespass to try title was instituted. It was designed as a simple and direct mode of litigating and quieting titles to lands which in almost every section of the country were conflicting and unsettled. Nine-tenths of the appropriated lands of the country were unoccupied, and in a majority of instances the claimants resided at a distance from them, and in many instances had never seen them. No actual trespass could be proved, because in many instances no actual entry had been made. It became necessary, in order to adapt this remedy to the necessities of the country, to enable parties who desired its benefits to avail themselves of it without the necessity of proving actual trespass, and for this purpose the clause of the statute under consideration was enacted.

"Its intention was simply to give an unobstructed remedy, by dispensing with a mere formality, not involving any right of the defendant. It was not the intention, nor is it the effect, of this clause of the statute, to shift the burden of proof, nor in any way to change or interfere with the general principles of law governing the rights of parties.

"We are of the opinion that the plea of 'not guilty,' in actions of trespass to try title, goes directly to the points in dispute under the evidence, and throws upon the plaintiff the burden of proving everything in relation to these points that is necessary to maintain his suit and entitle him to recover.

"The issues under this plea are in effect made by the evidence, and if any fact is found controverted there which is necessary to entitle the plaintiff to recover, the burden is on him to prove it. In this case, the evidence shows that the plaintiff claims land which is in the possession of the defendants. They deny that this is the same land described in the plaintiff's petition. The burden lies on the plaintiff to identify the land by proof. *Rivers v. Foote*, 11 Texas, 662; *Dally v. Booth*, 16 Texas, 565; *Ayers v. Duprey*, Galveston term, 24th March, 1864, 27 Texas, 593."⁴⁶

The next amendment of this statute was in the revision of 1879, which put the law in its present form. The changes made by it have been pointed out above. Among them was the doing away with the necessity of proof by the plaintiff of either actual trespass or adverse claim to the land by the defendant. Still the plaintiff is not relieved of fully making out his right to the very land sued for; to state it differently, the plaintiff must show his right to the very premises sued for and described in his petition. This, of course, involves the proof of the title in the plaintiff to the land described in his petition; not simply that the plaintiff owns land somewhere, but the very land which he has said in his pleadings that he owns. Having done this, he need not go further and prove that the defendant is in possession of this land or claims it adversely to him; this point in the case, so far as recovery of the land is concerned, the defendant has admitted by his plea of not guilty, which under the statute says, I, the defendant, do assert title to or am in possession of the land described in the plaintiff's petition. But this statutory construction of the plea does not say which of these wrongs against the plaintiff the defendant has committed. It may be either an actual entry depriving the plaintiff of possession and an appropriation by the defendant of the rents and profits of the property, or it may be a mere adverse claim of title which has in no way affected the plaintiff's actual enjoyment of it. Therefore if the plaintiff, in addition to the recovery of the land desires to obtain judgment for its use and occupation by the defendant, he can not rest upon this statutory admission, but must prove actual possession by the defendant, and the reasonable value of the rents and profits and the extent of the injuries to the premises which the defendant has committed.⁴⁷

⁴⁶ See also *Titus v. Johnson*, 50 Texas, 224.

⁴⁷ *Echols v. McKie*, 60 Texas, 41; *Cook v. Dennis*, 61 Texas, 246; *McNamara v. Meunsch*, 66 Texas, 68, 17 S. W., 397; *Railway Co. v. Prather*, 75 Texas, 53, 12 S. W., 969; *Blume v. Rice*, 12 Texas Civ. App., 1, 32 S. W., 1056; *O'Connor v. Luna*, 75 Texas, 592, 12 S. W., 1125.

Defense Under the Plea of Not Guilty.

Under the plea of "not guilty" the defendant may avail himself of any defense, legal or equitable, arising from the weakness of the plaintiff's case or from independent facts proven by the defendant, except the statutes of limitations, and improvements in good faith.⁴⁸

An outstanding legal title in another with which the defendant is not connected is available under this plea,⁴⁹ but not so with an outstanding equity.⁵⁰ Even stale demand when it is applicable is not required to be plead.⁵¹ The fact that the plaintiff sues in the wrong capacity, also, is covered by plea of not guilty.⁵² That the plaintiff procured his title by fraud, when the defendant is in condition to avail of the fact, can be shown under this plea.⁵³ That a deed from defendant to plaintiff absolute on its face was in fact a mortgage may also be shown,⁵⁴ or that the defendant owns the land.⁵⁵ In short, any defense which could under the ordinary rules of pleading be set up by general or special denial, or in confession and avoidance, or in estoppel may be urged upon this plea, except limitations or improvements in good faith.

The plea of not guilty can not, however, be used for the purposes of a cross-action and made the basis for affirmative relief. If the defendant wishes any judgment against the plaintiff, quieting his (defendant's) title, or giving him possession, or any affirmative relief whatever, he must make the proper allegations and prayer in his answer for such purpose.⁵⁶

If the defendant in addition to his plea of not guilty specially sets out the title or claim which he has in the premises, and seeks to justify his action thereunder, he is thereby confined to the defenses which arise out of the weakness of the plaintiff's case and to the mat-

⁴⁸ *Johnson v. Flint*, 75 Texas, 379, 12 S. W., 1120; *Neill v. Keese*, 5 Texas, 23; *King v. Elson*, 30 Texas, 246; *Chamberlain v. Pybas*, 81 Texas, 511, 17 S. W., 50; *Kauffman v. Brown*, 83 Texas, 41, 18 S. W., 425; *Herrington v. Williams*, 31 Texas, 450; *Ragsdale v. Gohlke*, 36 Texas, 286.

⁴⁹ *King v. Elson*, 30 Texas, 246; *Adams v. House*, 61 Texas, 639; *Tabor v. Lozano*, 6 Texas Civ. App., 698, 25 S. W., 973.

⁵⁰ *Ballard v. Carmichial*, 83 Texas, 355, 18 S. W., 734.

⁵¹ *Montgomery v. Noyes*, 73 Texas, 203, 11 S. W., 138; *Mayes v. Manning*, 73 Texas, 43, 11 S. W., 136.

⁵² *Blair v. Cisneros*, 10 Texas, 35.

⁵³ *Taylor v. Ferguson*, 87 Texas, 1; *Barth v. Green*, 78 Texas, 678, 15 S. W., 112.

⁵⁴ *Mann v. Falcon*, 25 Texas, 272.

⁵⁵ *Robb v. Robb*, 41 S. W., 92.

⁵⁶ *Archibald v. Jacobs*, 69 Texas, 248, 6 S. W., 117; *Schmidt v. Talbert*, 74 Texas, 451, 12 S. W., 284; *Schaub v. Dallas Brewing Co.*, 80 Texas, 636, 16 S. W., 429.

ters specially plead by him. Such special plea by the defendant does not make out the plaintiff's case for him, and he is still required to establish by proof a *prima facie* right in himself in order to recover, but having done this, it can be overthrown only by proof of the very facts specially plead by the defendant.⁵⁷

Plaintiff's Right to Meet Defenses Made Under Plea of Not Guilty.

As the plaintiff is not advised by the defendant's plea of "not guilty" what particular defenses the latter expects to interpose, he is not required to meet such an answer with any replication or supplemental petition, but is permitted to introduce evidence in rebuttal of defendant's evidence or in confession and avoidance, or in estoppel of the defenses interposed by the evidence.⁵⁸

Defenses of Limitation.

The one defense on the merits of the title which the defendant can not avail himself of under the plea of not guilty is limitation. There are three periods of possession which, concurring with certain facts, may respectively destroy the plaintiff's right and prevent any recovery by him against the party so in possession. The statutes giving these rights are known respectively as the statutes of limitation of three, five, or ten years. These may be interposed in connection with the plea of not guilty, and do not have the effect of limiting its effect in any way. The rule of pleading is that each plea of limitation must set up every fact which under the particular statute thereby invoked is essential to the defense. In each of these statutes there must be peaceable and adverse possession continuing for the length of time prescribed by the statutes. These terms are each defined by the statutes.⁵⁹ It is apparent that the allegation that the possession is peaceable and adverse is the averment of a mixed matter of law and fact, but the precedents sustain the use of these expressions as tendering issuable facts, and so the technical objection to them on that ground, it seems, can not now be urged. In addition to these features that are common, each statute has its specially characteristic elements.

⁵⁷ *Custard v. Musgrove*, 47 Texas, 217; *Sayers v. Texas Land and Mortgage Co.*, 78 Texas, 244, 14 S. W., 578.

⁵⁸ *Paul v. Perez*, 7 Texas, 338; *Rivers v. Foote*, 11 Texas, 671; *Hollingsworth v. Holshousen*, 17 Texas, 41; *Rodriguez v. Lee*, 26 Texas, 32; *Shields v. Hunt*, 45 Texas, 424; *McSween v. Yett*, 60 Texas, 183.

⁵⁹ Rev. Stats. 1895, arts. 3348, 3349; pp. —, *supra*.

Under the three years statute, the possession must be held for three years under title or color of title from or under sovereignty of the soil. While the statute gives these, title or color of title, in the alternative, that is not the proper method of pleading them. The averment should be direct and certain and not in the alternative. Both claims may be made,—that is, the allegation may be that the possession was under title and color of title and proof of either would be sufficient on this point, but to say the possession was under title or color of title would not be a direct averment of either.

At an early time it was decided that the plea must not stop with the averment of title or color of title, as the case might be, but must go further and show that the claim is under a transfer from or under the sovereignty of the soil.⁶⁰ The point does not seem to have been raised since that time. The decision seems to be clearly correct upon principle and should be followed. This is not, however, the universal practice.

A great many interesting questions have arisen under this statute, but they are almost altogether questions of substantive law and do not affect the manner of pleading or procedure.

Under the five years statute the essentials, in addition to the adverse and peaceable possession, are, that it must have been held for five years under a deed or deeds duly recorded, and all taxes lawfully assessed against the property must have been paid, and there must have been use and enjoyment of the property. There is a *proviso* to this statute as to forged deeds. It is held by the Court of Civil Appeals that this does not affect the pleadings by the defendant,—that is, the defendant is not required to plead that his deeds are all genuine; but the plaintiff, if he desires to raise this issue, must allege the forgery.⁶¹ This is based on the idea that the five years possession under deed duly recorded, the other facts concurring, make out a *prima facie* case under the statute, and if there be a forgery among defendant's deeds, this is an independent fact which the plaintiff must allege. The propriety of the ruling seems to be quite doubtful. The defendant is not required, in his plea of five years limitation, to set out the chain of title under which he claims. Why the plaintiff should be required to hunt up the records, and ascertain and determine in advance what deeds the defendant will offer in evidence to support his plea, or, if the defendant shall file his deeds and give the requisite notice to admit them in evidence, unless they are attacked as forgeries, and the plaintiff does make such attack upon them by filing affidavits as required by statute, why he should be obliged also to specially plead the fact of forgery is

⁶⁰ *Mason v. McLaughlin*, 16 Texas, 24.

⁶¹ *Harris v. Linberg*, 39 S. W., 651.

not readily apparent. I have found only the one case on the point, and do not regard it as settled.

Under the ten years statute, all that is necessary to entitle to one hundred and sixty acres, or more if held under written instrument, or in actual possession, is the peaceable adverse possession of the land for ten years. Prior to 1879 the right conferred by this statute extended to six hundred and forty acres, but by act of that date it was limited to one hundred and sixty acres, unless the excess were actually inclosed or were embraced in some memorandum other than a deed under which the possession is held. In the latter case, the right attaches to the whole tract of land so inclosed or covered by the memorandum. No payment of taxes, and no memorandum, and no deed are essential in this instance. A plea setting up rights under this statute should, in some way, identify the land claimed. If it be identical with that claimed by the plaintiff in his pleadings, the description by him may be adopted; if it be different, or if it embraces only a portion of that sued for, the defendant should describe the exact tract claimed by him so there may be some basis in the pleadings for an intelligent judgment in his behalf. This has not been expressly decided to be absolutely essential as to limitation. The principle has been applied in claim of improvements in good faith.⁶² It is certainly the best practice, and tends to the orderly, and intelligent conduct of the case, though it can not be said that it is mandatory under our system. The rule has special force in cases in which the defendant desires some affirmative relief on his part as to a portion of the land, and in such cases would seem to be mandatory, as he could have no judgment in his favor for a portion of the land not claimed and described in his answer.

IMPROVEMENTS IN GOOD FAITH.

There was a great deal of uncertainty regarding land titles in the early settlement of our State. Sovereignty had been exercised over the territory by different political powers, and naturally different systems of granting lands and of issuing titles had obtained. A great many genuine certificates were seriously doubted, and a great many false and fraudulent ones were issued and passed upon unsuspecting individuals without question. Actual surveying of lands and the establishment of permanent boundaries was expensive and in many instances dangerous, so that much of the reported surveying was done in offices with scales and dividers instead of on the field with chain and compass. The result was extreme and continuous confusion.

⁶² Selman v. Lee, 55 Texas, 319.

It was very desirable that the State should be settled. A citizenship with fixed homes and a land yielding fruits to support such citizenship were essential to the growth of the Republic and the State. Recognizing this, the legislative department of the government, at an early day, undertook to encourage the actual settlement and improvement of the country in every legitimate way. It gave certificates for land to persons who would come and settle in the State; gave homes upon the public domain to others settling there; passed laws protecting from forced sales a designated quantity of land as a homestead; and undertook, in pursuance of the same policy, to protect the man who settled and improved land belonging to another but which he honestly believed to belong to himself, by compelling the owner, when he should appear and demand possession, to pay to the improver the then reasonable value of the permanent improvements in excess of the rental value of the land which had been received by the possessor. This was the theory and purpose of the law; and in keeping with it we find that the defendant in possession may secure compensation for his improvements, provided he or those whose improvements he has bought, if he did not make them himself, acted in good faith in making them, and had been in possession for at least one year before suit was brought and the improvements were permanent fixtures, increasing the value of the land.

There have been several statutes on the subject agreeing in their main purposes, but differing somewhat in their details. The first of these statutes is the Act of February 5, 1840, which has previously been referred to. Its language on this subject is this:

"Sec. 8. Be it further enacted, that in any action of trespass to try titles, it shall be lawful for the defendant, at any time before the trial of the suit, to suggest to the court that he and those persons whose estates he has in the lands and tenements sued for, have had adverse possession of the same in good faith, for at least one year next before the commencement of such suit; and that he and those persons whose estates he has, have made permanent and valuable improvements on the lands sued for, during the time he or they have had such possession of the same; and the jury trying the suit, if they shall find for the plaintiff, shall at the same time inquire if the suggestion so made be true or false—if false, they shall return a verdict as in ordinary cases, for the damage sustained—but if true, they shall assess the value of the improvements at the time of the trial which have been made by the defendant, or by those whose estate he has, and shall assess the value of the land or tenements without considering the increased value thereof by reason of such improvements as shall have been made by said defendant, or by those whose estate he has, and they shall also assess the value of the use and occupation of said lands; and if the value of the use and occupation, as assessed, shall exceed the value of the improvements as

assessed, the court shall render a judgment against the defendant for the excess.

"Sec. 9. Be it further enacted, that in any suit where the value of the improvement so assessed shall exceed the value of the use and occupation, no writ of possession shall be issued for the term of one year after the rendition of the judgment, unless the plaintiff or his legal representatives shall pay to the clerk of the court, for the defendant, the excess of the value of the improvements over the value of the use and occupation; and if the said plaintiff or his legal representatives shall neglect, for the term of one year, to pay the excess in value of said improvements, and the said defendant, or his legal representatives, shall within six months of the expiration of said year pay to the clerk of the court, for said plaintiff, the value of the said lands or tenements as assessed by the jury, then the plaintiff shall be forever barred of his writ of possession, and from ever having or maintaining any action whatever against the defendant, his heirs or assigns, for the lands or tenements recovered by said suit; and if the defendant or his legal representatives shall not, within the said six months, avail him or themselves of the benefit of this act, the plaintiff, or his legal representatives, may sue out a writ of possession as in ordinary cases."

This law seems to have been generally recognized as valid, but was finally attacked as unconstitutional on the ground that it was a divestiture of the owner's title without due process of law, and consequently a violation of the contract contained in the grant of the land; and the case of *Green v. Biddle*⁶³ was cited in support of the contention. The Supreme Court, however sustained the statute, basing its opinion on the provisions of the Spanish law on this subject, which had been in force in Texas till the act now under consideration was passed, and was part of the contract evidenced by the grant; and on principles administered in courts of equity.⁶⁴ This decision was rendered in 1855. In the meantime, the Legislature in 1844 passed amendments to the act quoted above. Referring to and construing this later act, the court, in the case of *Hearn v. Camp*,⁶⁵ says: "The Act of February, 1844, professes in its title to be 'for the benefit of settlers in good faith,' and its provisions, are severely and energetically in conformity with the object and policy specified in the title. No doubt sound policy requires that a settler who honestly believes the land to be his own should be protected in his labor and industry and receive pay for lasting and beneficial improvements. This is demanded alike by the dic-

⁶³ *Green v. Biddle*, 8 Wheat., 1.

⁶⁴ *Scott v. Mather*, 14 Texas, 235.

⁶⁵ *Hearn v. Camp*, 18 Texas, 546, 1851.

tates of policy and the principles of equity as recognized to a greater or less degree in the codes of civilized nations. See Adams on Ejectment, 386, 391; 1 Maddox Ch., 90; 4 Cow., 168; 2 Wash. (C. C). 165.

"And where, for the want of a system, most of the lands have been granted twice or more times, and the conflict has become so great that without the judgment of a court it can not be ascertained who has the better title, the settler who, through an honest though mistaken belief that he has a good title, has opened fields, built houses, and made improvements, is entitled to the most liberal protection, and possibly, under such circumstances, the rights of the real owner may not be entitled to much weight until fixed and ascertained by the judgment of the court.

"Under such circumstances, the provisions of the occupying claimant laws of Kentucky were held by the courts of that State to be constitutional, though against the decisions of the Supreme Court of the United States in *Green v. Diddle*, 8 Wheat., 1. But such extreme legislation can only be justified by extraordinary circumstances. This tendency of legislation in favor of the settler, and as against the real owner, must have some limits. The lands of an individual can not be taken for public use without compensation, much less can they be wrested from one man and given to another; neither directly, nor indirectly by such clogs, restrictions and burthens upon his right of recovery, as to in a great measure destroy the value of the property itself.

"A right to the land has been well said to imply a right to the profits accruing from it, since without the latter the former can be of no value. Thus a devise of the profits of the land will pass the land itself. *Shep. Touchstone*, 93; *Co. Litt.*, 4; 8 Wheat., 76.

"In the case of *Scott v. Mather*, 14 Texas, we have decided that the defendant, being a settler in good faith, is entitled to full payment for his improvements, though this might exceed in amount what was owing from the defendant for the use and occupation; and it is believed that the Legislature did not exceed its powers when it declared, in the first section of the act of 1844, that there should be no recovery for the use and occupation prior to suit brought. Yet it is believed that the Legislature transcended the limits of the Constitution when they inhibited recovery for the rents, unless pay for the improvements was tendered before the commencement of the suit, or there was a tender to submit the matter to arbitration. In the first place, the Legislature has no power to compel a litigant to submit any matter in dispute to arbitration; and in the second place, the provision is contradictory, repugnant, and suicidal in itself. The very question to be determined by the jury on the trial is, whether the settlement was in good faith. Upon this depends the settler's right to pay for improvements at all; at least his right under the statute. How, then, can

the plaintiff be required, before he commences suit, to arbitrate the matter of improvements or pay for them, until it be determined on the trial that the defendant is entitled to compensation for such improvements? The provision is not only rigorous and harsh to such an extent as to be beyond the just limits of legislation, but is contradictory in itself, and as such should not be enforced. The conclusion from a review of these sections is that the successful claimant can recover from the defendant for the use and occupation from the commencement of the suit; and he is not required to tender pay for the improvements, or arbitration in regard to such pay, before he brings the suit, in order to entitle him to recover the rents and profits. There was error in so much of the charge as would authorize a recovery for the use from the commencement of possession by the defendant."

Shortly after the decision just quoted was rendered, the question was again passed upon by the court in the case of *Saunders v. Wilson*.⁶⁶ This case reiterates the substance of the two decisions given above affirming the doctrine announced in both, viz., that the Act of 1840 was constitutional and that the provisions of the Act of 1844 denounced in the last opinion were void. This has since been regarded settled law, and all subsequent legislation on the subject has dealt with it on that basis.

The present statutes have been given.⁶⁷

Procedure Under This Statute.

To obtain the benefits of this statute, the defendant must allege the points upon which he relies as entitling him to them. He can not recover for his improvements under a plea of "not guilty" simply. The two pleas are not inconsistent, but one does not take the place of the other.⁶⁸ These facts thus entitling him are adverse possession by himself, and those under whom he claims, of the premises in controversy, for at least one year next before the bringing on the suit; good faith by the parties so in possession; that is, an honest and rational belief, based on reasonably sufficient facts, that they owned the land; the making of improvements both valuable and permanent on the premises during such possession; the continuing nature of the improvement, and that they are on the land at the time of the trial. Each of these facts must be set up specifically and in legal form.⁶⁹

⁶⁶ *Saunders v. Wilson*, 19 Texas, 194, 1857.

⁶⁷ Rev. Stats. 1895, arts. 5277-5285; page —, *supra*.

⁶⁸ Rev. Stats. 1895, arts. 5256-5277; *Rogers v. Bracken*, 15 Texas, 564; *Bonner v. Wiggins*, 52 Texas, 125.

⁶⁹ Rev. Stats. 1895, art. 5277; *Thompson v. Comstock*, 59 Texas, 318; *Jobe v. Oilre*, 80 Texas, 185, 15 S. W., 1042.

Prior to 1879 the general allegation of good faith was sufficient on that point, but this is not so under the present statute. The simple averment that the possession was in good faith is no longer permitted. The plea must state the grounds of the claim to the property,—that is, it must state the nature of the title or claim and why it was thought sufficient, and the matter so stated must be legally sufficient for the support of this contention, otherwise the plea is bad on demurrer. Simple faith in one's claim without some good foundation is not sufficient, and hence, in pleading "good faith," it is essential that the allegations as to the "grounds" shall show facts upon which the party was legally entitled to rely and act as a claim in himself.⁷⁰

The statutes of 1879 also require a more detailed statement of the nature and extent of the improvements than was held necessary before, and care must be taken not to be misled by the earlier cases on this subject.

Where the defendant is sued for a tract of land larger than that which he claims, and he desires to have the question of pay for his improvements determined, he must in his answer describe the particular land which he owns, otherwise it is impossible to introduce evidence of those facts which lie at the very foundation of his rights,—namely, the increased value of the land by reason of the improvement, the rental value of the land without improvement, etc.⁷¹ It is better form to set up the rental value of the land apart from the improvements also. But I know no decision which declares this to be necessary.

The plea or suggestion must affirmatively show adverse possession for one year before the suit was filed,⁷² and that the improvements were made before suit, and while defendant or his grantor was in possession in good faith.⁷³

SUPPLEMENTAL PLEADINGS.

The parties can file supplemental pleadings in this action as in other cases. If the method of setting out the facts constituting title be adopted, such pleadings are very often essential. If the defendant's answer be confined to demurrers and a plea of "not guilty," there can

⁷⁰ *Powell v. Davis*, 19 Texas, 382; *Ragsdale v. Gohlke*, 36 Texas, 286; *Miller v. Brownson*, 50 Texas, 584; *House v. Stone*, 64 Texas, 678; *Thompson v. Comstock*, 59 Texas, 319; *Holstein v. Adams*, 72 Texas, 489, 10 S. W., 560.

⁷¹ *Sellman v. Lee*, 55 Texas, 319.

⁷² *Scott v. Maynard*, *Dallam*, 548.

⁷³ *Crumbley v. Busse*, 11 Texas Civ. App., 319, 32 S. W., 438.

be no supplemental pleading, for there is nothing in the pleading to which the plaintiff can reply by pleading further. In such cases as the defendant can avail himself of any defense which he may be able to prove, which would have been good if plead, except limitation and the qualified defense of improvement in good faith; justice requires that the plaintiff may without further pleading on his part introduce in evidence matters in rebuttal, or confession and avoidance, or of estoppel, to meet the matters proved by the defendant.⁷⁴ The early authorities on this point have never been questioned.

If, however, the defendant does not plead "not guilty" or if in addition thereto he pleads special matter of confession and avoidance or of estoppel, then the plaintiff must reply to this by proper pleading, or else he will be confined to the matters admissible under his original petition, and in rebuttal of the matters plead by the defendant, and will not be permitted to confess and avoid the new matters set up by the defendant.⁷⁵

This has been frequently decided with regard to disabilities, which prevent the running of the statutes of limitation against the plaintiff, as plead by the defendant. The general rule being that the statutes of limitation run against all persons, if some special fact exists as to a particular litigant which prevents them from running as to him or her, he must bring these special facts to the knowledge of the court and the adverse party by appropriate averments before they can be taken into account in determining the rights of the parties. The most natural and appropriate method of doing this is by filing a supplemental petition containing the allegations. These must show the facts constituting the disability, and that they have existed for such length of time and under such circumstances as to prevent the running of the statute. It is not sufficient to show that they exist at the time of filing the supplemental petition nor at the date of the institution of the suit; but it must appear that they existed when the cause of action set up accrued, and have continued up to the filing of the pleading or for such length of time as to prevent the bar of the statute.

Jurisdiction and venue and parties in these actions have been fully considered in the several chapters on those heads; the other matters in the statute not discussed in this chapter seem to be strictly questions of procedure not directly connected with pleadings.

⁷⁴ *Hunt v. Turner*, 9 Texas, 385.

⁷⁵ *Paschal v. Perez*, 7 Texas, 348; *Rivers v. Foote*, 11 Texas, 671.

CHAPTER XVII.

MOTIONS.

Under our system there are but two ways of applying to a court or judge for judicial action,—by pleading and by motion. The first has been already defined and embraces the formal presentation to the court of the matter constituting the plaintiff's cause of action and the defendant's ground of defense. The second embraces all applications not made by pleadings.

During the progress of a trial many matters aside from those presented in the pleadings come up for judicial action and require to be settled by the court in order that justice may be done and a proper judgment finally reached. In many such instances the court will act as of course without application of either of the parties; in others, the court does not take the initiative, but acts only in response to request. Such a request to the court is a motion.

Under the equity practice and also under the code system as it exists in many of the States, there is still a third method of applying to the court for assistance. This application is known as a "petition." It may be said in general that the matters presented in this way are those not so far reaching or important in their consequences as to be embraced in the pleadings or to form part of the relief sought on final hearing, nor yet so trivial as to be presented by the informal means of a motion. Our system of practice does not recognize this distinction, and with us every application for judicial action not embodied in the pleadings is known as a motion. On the other hand, under the code system in some States, matters can be reached by motion which with us can be raised only by pleadings. Formal defects in the pleadings of the adverse party are in those States called to the attention of the court by motion to strike out or to reform the defective instrument; in our practice, these objections can be reached only by special exceptions. It is important to keep these distinctions in mind, in order not to be misled by the authorities based upon the equity and code practices.¹

DEFINITION.

A motion in our practice may be defined as an application to a court or judge, not presented by the formal pleadings of the parties, for

¹ 14 Enc. of Plead. and Prac., title "Motions."

some action or order desired at the institution or during the progress of a case, which does not contemplate a final adjudication on the merits of the cause of action. *

It asks a court or judge to do something which does not finally settle the matters in controversy, but which will aid the party in the preparation or institution of his case, or secure the rights and claims of the party pending the litigation, or which will assist in the accomplishment of the purposes for which the suit was brought, or in some way compel the parties to carry on the litigation in conformity to law. It is apparent that these requests or applications may be very different in their purposes and results. The matter may be of the most trivial character, as, for instance, the correction of some formal irregularity in a process or return; it may be a matter of right which will be granted as of course,—as leave to file an amendment to a party's pleading, or to place a case on the jury docket when made in proper time and manner; or it may be of such nature as to result in the termination of the cause,—as a motion to dismiss for want of prosecution; or its determination may necessarily involve questions which will be of great, if not controlling, influence on the final hearing,—as a motion to dissolve an injunction for want of equity in the bill. But whatever its nature, if it relates to the manner of conducting the litigation, or seeks an interlocutory order, the application is with us designated a motion.

The motion is strictly the application to the court, and should be distinguished from the grounds or reasons upon which the motion is made, and also from the instruments in form of affidavits or otherwise, which may accompany it in support of the reasons assigned. To illustrate: A motion for new trial is made on the ground of newly discovered testimony, and affidavits of the newly discovered witnesses are filed with it, showing what they will swear, and also the affidavit of the party showing the discovery of the evidence by him since the trial, and negativing negligence on his part in not having sooner discovered it. Here the motion is the request for the new trial. The grounds or reasons of the request are the facts that there is material testimony discovered by the party since the trial and the absence of laches on his part. The proof of these grounds are the affidavits of the proposed witnesses and of the party, considered in connection with the record in the case. While it is well to have these distinctions in mind on account of their theoretical accuracy, the word "motion" is practically used to cover both the application or request to the court and the reasons assigned as a basis for such action. This is almost universally true of motions in writing.²

The grounds for the motion may be matters already in the record, or

² See statutory provisions regarding motions for continuances; Rev. Stats. 1895, arts. 1276-1278; for new trials, Rev. Stats. 1895, arts. 1371-1374.

matters transpiring in the presence of the court, or matters not coming within either of these classes. In the first two cases the court will act upon the record, or upon its own knowledge, as the case may be; in the last, the facts relied upon must be shown to the court according to the rules of practice and the nature of the case. Usually the proof is made by affidavits, voluntarily given by persons who know the facts, and filed in the court in connection with the motion. When the facts are known to and proven by the party making the motion, the motion and affidavit are usually put in one instrument.

FORMS OF MOTIONS.

Motions may be either oral or written. The statute requires that all motions filed must be entered on the motion docket.³ The Supreme Court refers to this statute incidentally in the case of *Houston v. James*,⁴ and the reporter in the syllabus says, "All motions in the District Court must be in writing, filed," etc. Neither the statute nor the decision says this; but only that all motions which are in writing must be filed and entered on the motion docket. The difference is manifest. Oral motions, some of them having most serious consequences, are made and entertained every day. If the plaintiff neglects his case and permits it to remain on the docket without pressing it with that diligence which the law requires, the defendant can move orally that the case be dismissed for want of prosecution and the court will entertain and grant the motion; and it will do so in a great many other instances.

There is no prescribed form for an oral motion. It is merely an intelligible request made to the court to do a certain thing in a certain case. It should be as concise as is consistent with clearness; but, unless it is a mere formal application which is granted as of course, it should be accompanied by a short statement of the reasons on which the court's action is sought, and, unless these are of record or have transpired in the presence of the court, they should be supported by proofs either in form of affidavits or, in rare instances, by oral testimony.

Written motions should be entitled and numbered with the style and number of the case in which they are made and must be filed with the clerk. They should be a plain and express request for the action desired of the court, and they usually set out the reasons on which the court is expected to act. This should be done clearly, fully, and logically,—the same general principles being followed that are applied in the preparation of pleadings. No ground or reason for granting the

³ Acts 1846, p. 200, sec. 53; Rev. Stats. 1895, art. 456; Rules District and County Courts, No. 21.

⁴ 4 Texas, 170.

motion can be considered if not set out, except a few fundamental matters such as the court, if advised of the facts, would act upon in the absence of motion. If the reasons set out in the motion are proven by the record,—that is, by the pleadings of the adverse party, by any action of any officer of the court taken in the case and shown by the entries on the dockets and minutes of the court, by the original papers on file in the case, or by the pleadings of the moving party prepared and verified as required by law for such purposes, no further proof in support of the motion need be made; in all other instances the motion must be supported by evidence, usually furnished by *ex parte* voluntary affidavit of the party or of others acting with or for him.

In some instances statutes require that the supporting facts be covered by the motion and its reasons, as in application for continuance;⁵ in others, that all the grounds be set out either in or in connection with the motion, as in motion for new trial,⁶ to supply lost records, etc. In all such cases the statute must be complied with.

The power of a court to hear and determine motions in a case is not ended by the entry of final judgment. Its jurisdiction to enforce the conclusion arrived at in any case carries with it the power to hear and determine any issues that may arise therein between either of the parties and the officers of the court as to the proper execution, levy, and return of the process, or as to the paying over of money collected under it.

DIFFERENT KINDS OF MOTIONS.

As the power of the court to hear applications and make orders in a case begins even before the regular institution of the suit, as in case of granting leave to file a *quo warranto* petition or issue an order for a temporary writ of injunction, and extends to the execution of the final process issued, as in cases of misconduct of an officer executing such process, so the occasions for such orders arise at all times, and the orders themselves which may be desired are as various as the various exigencies of the numerous and diverse law suits themselves. Hence a strict classification of the motions which may be made before the court is impossible. They are, however, usually made to secure one or more of the following ends:

First—Some action by the court operating directly on the case, advancing or retarding its progress.

Second—Some action in the form of an interlocutory order, operating on the parties or on the subject matter of the litigation or on the thing about which the litigation is carried on.

⁵ Rev. Stats. 1895, arts. 1276-1278.

⁶ Rev. Stats. 1895, arts. 1371 et seq.

Third—Some action regulating the conduct of an officer in connection with the litigation.

Fourth—Some action providing a special means or agency for facilitating the litigation or the court's control over the *res*.

Fifth—Some action directly controlling the adverse party as to the matters in litigation.

Sixth—Some action controlling the conduct of other parties so connected with the litigation as to make such conduct a proper subject for judicial regulation.

In the first class are embraced applications for leave to file special kinds of cases, as *quo warranto*, to consolidate suits, to substitute lost papers, to change venue, to continue, postpone or advance the case, to change from one docket to another, to set aside venire or panel of jurymen, to withdraw case from jury, to direct verdict, to enter judgment *non obstante verdicto*, to have judge file conclusions of law and fact, to obtain new trial, or arrest the judgment, to make new parties, to revive suit, to set aside order of dismissal, and others of similar nature.

The second class embraces applications for attachment, sequestration, garnishment, temporary injunction, alternate *mandamus*, to sell property in custody of court pending the litigation, and for the purpose of setting aside any of the orders mentioned above or the action of any officer taken under them.

The third embraces all applications to compel issuance of process by the clerk, or its service by the sheriff or constable, or for correction of any erroneous or imperfect action by any officer, as correcting a citation improperly issued, or the return of service on it; also to compel proper entries of all orders made and judgments rendered in a pending suit either at the time made, or *nunc pro tunc*, if not entered at proper time; to compel issuance of commission to take deposition, or the attendance of witnesses before the officer taking depositions; or to quash the deposition as returned, or to strike out certain answers in it; to compel the proper levy of or sale and return under execution or other final process, or payment of money collected under it.

The fourth embraces applications for order of survey; for appointment of an auditor, or receiver, or master in chancery, or of one or more physicians to examine a person whose physical or mental condition is matter of investigation before the court, and all similar aids to the hearing of the case before the court.

The fifth embraces applications to compel security for costs, to permit inspection of papers in possession of adverse party, or to take the person of a party into legal custody to compel compliance with any lawful order made by the court, etc.

The sixth embraces applications for attachments for witnesses, placing them under the rule, etc.

The foregoing is by no means a complete enumeration of all the

motions which may be properly made in a case; but it comprises those most important and most frequently used, and will suffice for illustration.

The detailed consideration of the several kinds of motions can not be taken up in a work of this kind, but must be sought for in works of procedure.

NOTICE OF MOTIONS.

Every litigant must at his peril keep himself posted as to the cause of action before the court and all matter directly connected therewith or growing out of the manner of conducting the case,—if he is plaintiff, from the time of instituting the suit; if he is defendant, from the time the citation requires him to appear and answer. This obligation rests upon both parties up to the time that final judgment is rendered. He must take notice of everything done in the progress of the litigation except those things of which the law expressly requires him to be notified. After final judgment is rendered he is charged with notice of nothing unless the law has expressly relieved the adverse party from the necessity of giving notice. The parties to a suit are, after judgment, no longer before the court in such way as to be cognizant of its proceedings in the same sense they were after active jurisdiction had been acquired over them and before the rendering of the judgment.⁷

The Legislature has recognized this difference in the rules of practice embodied in the following statutes:

“Notice of motions in a suit pending is given by the filing of the motion and entry thereof on the motion docket during the term.”⁸

“When a motion does not relate to a pending suit, and where the time of service is not elsewhere prescribed, the adverse party shall be entitled to three days notice of the motion.”⁹

The first of these statutes covers the general question of notice of motions made in pending suits and desired to be acted upon in term time. It does not, however, cover applications made in such cases to the judge in vacation nor some special motions in which notice is required by the statutes authorizing them. In cases of the latter kind the statutes are to be consulted and their provisions exactly complied with.

When notice beyond the filing of the motion is required and there are no express provisions regarding it, it must be given in writing. It is

⁷ *De Witt v. Monroe*, 20 Texas, 289.

⁸ Rev. Stats. 1895, art. 1458.

⁹ Rev. Stats. 1895, art. 1460.

prepared by the party or his attorney and signed by him—not by the clerk, as in case of legal process. It should show, by style and number, the case in which the motion is made, and should indicate clearly the nature and grounds of the motion. No special form is required; but, as its purpose is to inform the party of the nature of the action sought and the reasons for such action, it must be full enough to do this with reasonable certainty. It must also indicate the time and place of hearing, unless the action be of such nature that the law fixes the time and place, which is usually the case with motions before a court in a pending suit. In some instances, as in notices of filing of interrogatories to take depositions, the notice is filed with the clerk and he issues a copy and a precept requiring the sheriff to serve the copy on the adverse party. In these cases, in absence of any special statutory provision, the service may be made by any officer authorized to serve process from the court, or by any private party who is competent to testify as a witness. The service may be had either on the party or on his attorney of record; and is made by delivering a copy of the notice to the party served, if he is a resident of the county where suit is pending, or of such copy together with a copy of the motion and accompanying papers, if he is a non-resident of the county. If the service is made by an officer, his official return as upon regular process from the court is sufficient; if made by one not an officer, the return must be verified by the person making it. In either case the return is *prima facie* proof of the matters recited, but in neither is it conclusive.¹⁰

The same rules are applied when the motion is not in a pending suit, except that service must be had upon the party himself and not upon his attorney of record.

All parties whose interests would be adversely affected by the granting of the motion must be notified. Where the motion is in a pending suit, we have seen that filing the motion and having it docketed is all that is required as notice, but this rule is limited to parties to the suit actually before the court. If any other person is adversely interested and is sought to be affected by the motion, he must be duly served with notice in conformity to the rules discussed above. If the motion is not in a pending suit, but is made after rendition of final judgment, then all the adverse parties to the litigation must be notified. This is illustrated in the case of *De Witt v. Monroe*,¹¹ in which a sale of property had been made to satisfy a judgment and the judgment had been credited with the amount of the proceeds. The plaintiffs moved to set aside the sale and credits and to have the judgment revived and declared good for the whole amount. They did not give the defendants notice of the

¹⁰ Rev. Stats. 1895, art. 1457.

¹¹ 20 Texas, 289.

motion. The court heard the motion, set aside the sale, and restored the judgment. The Supreme Court reversed the judgment of the district court, saying: "That there must have been notice of this motion given to the defendants is almost too plain for controversy. * * * Their interests were being adjudicated and they had a right to be notified and then to be heard by the court making the adjudication. This is a fundamental principle applicable to all proceedings of a court of justice at every stage of their progress."

If the interests of third parties have intervened they must also be made parties.¹²

TIME AND MANNER OF HEARING MOTIONS.

The time and manner of hearing motions are regulated by statute and rules of court, as follows:

"The clerk shall keep a motion docket in which he shall enter every motion filed in his court, the number of the suit in which it is made, if it relates to a suit pending, the name of the parties and their attorneys, with a brief statement of the nature of the motion."¹³

"The clerk shall keep a motion docket in which all motions, when filed, shall be placed, with names of the parties and counsel, with the date of the filing and its number and the number of the case, which filing shall be considered notice of such motion before the continuance or final disposition of the case for the term, except where it is otherwise provided by statute."¹⁴

"All motions relating to a suit pending, which do not go to the merits of the case, may be disposed of at any time before the trial of the cause."¹⁵

"All motions not relating to a suit pending shall be taken up and disposed of in their order as other suits are required to be."¹⁶

"The court will set apart a particular day each week of the term, when the motions previously made, in which proper notice has been given, shall be determined, if urged, unless for good cause they are postponed for a day during the term or continued by consent to the next term.

"When notice shall be given of objections to the form or manner of taking and returning depositions, either party may require it to be put

¹² *Toler & Crosby v. Ayres*, 1 Texas, 400; *McKinney v. Jones*, 7 Texas, 598.

¹³ Rev. Stats. 1895, art. 1456.

¹⁴ District and County Court Rule No. 21.

¹⁵ Rev. Stats. 1895, art. 1459.

¹⁶ Rev. Stats. 1895, art. 1461.

on the motion docket and tried as other motions; provided, if not sooner tried, it shall be decided before either party shall be required to announce readiness for trial on the facts.

"All dilatory pleas and all motions and exceptions relating to a suit pending which do not go to the merits of the case shall be tried at the first term at which the attention of the court shall be called to the same, unless passed by agreement of parties with the consent of the court; and all such pleas and motions shall be first called and disposed of before the main issue on the merits is tried.

"All motions which go to the merits of the case, and all exceptions, general and special, which relate to the substance or the form of the pleadings, shall be decided at the first term of the court when the case is called in the regular order for trial on the docket, if reached, whether there be an announcement on the facts or not, unless passed by agreement of the parties with the consent of the court."¹⁷

Rule 23 above must be taken in connection with the statute which requires the court to pass on such objections to depositions at the first term after the depositions have been returned.¹⁸

From the foregoing it is apparent that the regular method of bringing a written motion in a pending suit to the attention of the court is to file it with the clerk and have it entered regularly upon the motion docket. It is the duty of the court to designate one day in the week for taking up this docket. At that time the court calls the motions on this docket in their regular order, and as each is reached it should be disposed of unless for some cause, to be judged of by the court, it is postponed until some other time—either the next call of the docket or some certain time set for hearing it. As, however, many motions relate to matters requiring immediate attention, another rule provides that they may be called up at any time. This calling up at irregular times is largely within the discretion of the court, and the hearing will be taken up or set for such time as the circumstances of the case make just and expedient. If any preliminary motion in a pending case is undisposed of when the case itself is reached on the trial docket, it must then be called up, or in most cases it will be considered as waived and the party can not insist on it at a later time in the trial court nor take advantage of it on appeal.

If the case in which the motion is made has been determined, the motion takes its place on the regular trial docket and is tried as other cases.

Motions in pending cases are tried by the judge. Neither party is entitled to a jury. Motions not in pending cases are disposed of as other suits of similar import.

¹⁷ District and County Court Rules, Nos. 22, 23, 24, 25.

¹⁸ Rev. Stats. 1895, —

It is not usual in motions in pending cases to hear oral testimony. If it involves facts outside of the record, the party making the motion files affidavits by himself or others and the opposite party can file controverting affidavits.

In rare cases oral testimony will be received.

In motions made in suits not pending, oral testimony is usually received and both parties may introduce evidence under the same rules that govern in ordinary cases.

Upon conclusion of the hearing, if during term time, the court renders its decision and it is entered in the minutes. If the hearing is before a judge in vacation, he makes a minute of the proceedings and conclusion arrived at and furishes this to the clerk of the court, who enters it on the minutes of his court. Subsequently the case will be conducted with reference to the order and entry in the same manner as if they had been made in term time. The court has large discretion in the matter of costs in passing upon motions, but they are usually taxed against the party against whom the order is rendered.

CHAPTER XVIII.

ABATEMENT, DISCONTINUANCE, AND DISMISSAL FOR
CAUSES ARISING AFTER SUIT BROUGHT.

The terms used in the Texas statutes¹ to indicate the termination of a suit before a trial and decision on the merits has been had are "abatement" and "discontinuance." Dismissal, though a common word in the authorities, does not occur in the statute. This is a somewhat broader term than those used in the statute, and is frequently loosely used to indicate the ending of a case in any way before a hearing and adjudication on the merits. The authorities make a distinction between the meaning given the word abatement in common law and equity practice, holding that in the former it means the absolute determination of the suit and in the latter "only a state of suspended animation" from which it could be revived by proper action.²

It is apparent from the statute in its present form and also from the earlier enactments which have developed into the present, that in our law the term "abatement" is used in the common law sense of absolute ending of the suit and signifies such termination in favor of some or all of the defendants by operation of law, or by act of the court, not by the procurement of the plaintiff, but against his will; discontinuance, however, with the possible exception of its use at the end of article 1247, means the voluntary abandonment of the case by the plaintiff, as to one or more of the defendants.

Abatement by Death of Parties.

The most frequent cause of the abatement of suits and the one giving rise to the most difficult questions is the death of one or more parties to the litigation. On this subject the early common law was very simple. The death of any party to a common law action terminated it absolutely and nothing more could be done in the case.³ The right of the proper representatives of the deceased plaintiff to bring another suit or the liability of the proper representatives of the deceased defendant to be sued again

¹ Rev. Stats. 1895, title 30, chap. 7.

² Life Assn. of America v. Goode, 71 Texas, 96, 8 S. W., 639.

³ Alexander v. Barfield, 6 Texas, 402; Warren v. Furstenheim, 1 L. R. A., 40; Schreiber v. Sharpless, 110 U. S., 76.

was altogether a different question and was determined by different considerations. In many instances, the cause of action survived in favor of the estate of the deceased plaintiff or against the estate of the deceased defendant, although the suit pending at the time of the party's death could not be further prosecuted. Much of the confusion in the law on this subject has grown out of the failure to recognize this distinction.⁴ Whether or not a cause of action exists at the time a suit is begun is a matter of substantive law; whether or not a suit properly begun shall before hearing on the merits be abated because of some event transpiring since its institution is a matter of practice or procedure, yet where the abatement of the suit depends upon the extinguishment of the cause of action, the intelligent discussion of the latter necessarily involves the former.

The Texas statutes enacted prior to 1895⁵ recognized the common law doctrine that death of a party destroyed some causes of action and left others unaffected; but they did not undertake to determine and declare what the common law doctrine was, nor to interfere in any way with its operation. All their provisions were with regard to the practice in those cases in which the cause of action continued, or "survived" as expressed in them, and regulated the practice in such cases.

In 1895,⁶ the Legislature adopted a different policy and changed the rules of the common law as to abatement of some causes of action, which had not theretofore survived the death of the party, provided suit had been brought thereon before the death occurred. This statute has no application to cases in which the person having the cause of action, or against whom it exists, dies prior to the filing of the suit. As to such causes of action the common law rules are still in force. It is therefore important to ascertain, if we can, what the common law rules on this subject are. The task is far from easy. The earliest discussions seem to teach that all contract liabilities survived and all tort liabilities died with the death of either party.⁷ The word tort was evidently used in these cases in a much more restricted sense than it is at present, and many causes of action now regarded as tortious survived the death of the parties even at that time. In later cases, the causes of action which died with the person were limited to those based on injuries to the person as distinguished from injuries to property or property rights.

In *Tanney v. Edwards*,⁸ the court, through Judge Moore, quotes with approval from 1 Chitty's Pleadings, 68, the following test: "In all cases

⁴ *Warren v. Furstenheim*, 1 L. R. A., 40; *Schreiber v. Sharpless*, 110 U. S., 76.

⁵ Acts 1836, p. 203; Acts 1846, p. 363; Rev. Stats. 1879, title 29, chap. 7.

⁶ Rev. Stats. 1895, art. 3353a.

⁷ *Watson v. Loop*, 12 Texas, 14; 3 Blackstone, 302.

⁸ 27 Texas, 225.

of injuries to the person, whether by assault, battery, false imprisonment, slander, or otherwise, if either the party who received or committed the injury die no action can be supported either by or against the executors or other personal representatives." This rule was applied in a case of malicious prosecution where both parties died after judgment in district court and while an appeal was pending. The case has been overruled as to abatement after judgment,⁹ but has been approved as to the common law doctrine of the survival of causes of action.

In *Railway Company v. Freeman*,¹⁰ our Supreme Court adopts the following language from a New York decision: "Mere personal torts die with the party and are not assignable. Such are actions for slander, libel, assault and battery, false imprisonment, criminal conversation, seduction, etc. On the other hand, when the injury affects the estate rather than the person, when the action is brought for the damage to the estate and not for injury to the person, personal feelings, or character, the right of action could be bought and sold. Such right of action, upon the death, bankruptcy, or insolvency of the party injured, passes to the executor or assignee as part of his assets, because it affects his estate and not his personal rights."

In *Jenkins v. French*,¹¹ the Supreme Court of New Hampshire says: "The line of demarcation separating those actions which survive from those which do not is that in the first the wrong complained of affects primarily and principally property and property rights and the injury to the person is merely incidental, while in the latter the injury complained of is to the person and the property and the property rights affected are incidental."

The Act of 1895 is in these words: "Causes of action upon which suit has been or may hereafter be brought by the injured party for personal injuries other than those resulting in death, whether such injuries be to the health or to the reputation, or to the person of the injured party, shall not abate by reason of his death, nor by reason of the death of the person against whom such action shall have accrued; but in case of the death of either or both, such cause of action shall survive to and in favor of the heirs and legal representatives of such injured party, and against the person, receiver, or corporation liable for such injuries and his legal representatives; and so surviving, such cause may hereafter be prosecuted in like manner and with like legal effects as would a cause of action for injuries to personal property."¹²

It seems, therefore, that if the cause of action is one growing out of

⁹ *Gibbs v. Belcher*, 30 Texas, 81.

¹⁰ 57 Texas, 158.

¹¹ 58 N. H., 533.

¹² Rev. Stats. 1895, art., 3353a.

a violation of personal rights as contradistinguished from property rights, the death of either the injured person or the wrongdoer before suit is brought will extinguish the cause of action. If it be for personal injuries, whether to the health, reputation, or body, and suit is brought before the death of either party, the cause of action will survive and the suit need not abate by reason of subsequent death of either party.

If, however, the cause of action be personal in its nature, but is not for injuries sustained in health, reputation, or body, such as suits for injuries to the feelings merely, as many telegraph cases, for breach of promise of marriage, and others, the statute has no application and the cause of action ends with death, whether suit has been previously instituted or not, unless it has proceeded to a verdict; if it has, the cause of action is merged in the verdict and survives.¹³

Cases affecting personal status or condition, as divorce, or right to some position of trust, and others¹⁴ of similar kinds, of course die with the party whose status is to be adjusted or rights determined.

Suits or actions merely possessory, or affecting the title merely, in which no damages or money judgment is sought, abate on the absolute destruction of the thing about which the litigation is being carried on.

There are also some cases that arise *ex contractu* which are not embraced in the statute above quoted and which do not survive the death of the defendant, as suits for penalties on bonds.¹⁵

Under our liberal practice as to joinder of causes of action it not infrequently occurs that part of the matter in controversy in a suit will survive the death of a party and part will not. When this is the case and the death of the parties is suggested, the court should abate so much of the suit as is extinguished by the death, and, if the remainder is within its jurisdiction, should proceed to try it. If the matters surviving are not within its jurisdiction, then it should dismiss the whole proceeding.¹⁶

Further Statutory Provisions.

We can now consider intelligently title 30, chapter 7, of our Revised Statutes containing the rules of procedure in case of death of parties pending litigation. The first, second, and third articles in this chapter prescribe the practice in cases in which the sole plaintiff or defendant dies after suit is brought and before verdict, in cases in which the cause

¹³ Rev. Stats. 1895, art. 1251.

¹⁴ *Williams v. Mullens*, 43 Texas, 610.

¹⁵ *State v. Schuenemann*, 46 S. W., 260. For interesting discussion of what are penal liabilities and what are not, see *Aylesworth v. Curtis*, 33 L. R. A., 110.

¹⁶ *Dwyer v. Bassett*, 29 S. W., 815.

of action survives. As, at the time this statute was adopted, there was no statutory regulation of the survival of causes of action, its provisions are confined to cases of survival at common law. The Act of 1895 has substantially the same provisions as to practice in cases of survival as now regulated by statute. The effect of these statutes is that if it is the plaintiff who dies his executor or administrator, or, in case there is no necessity for administration, his heirs can come in and make him or them parties plaintiff and the suit will proceed. If no such person comes forward at the first term after the death, the defendant can have the clerk issue a *scire facias* to such representatives. If he does not appear and prosecute the suit by the appearance day of the first term of the court after such notice, the defendant can have the suit dismissed for want of prosecution.

If it is the defendant who dies, the plaintiff can suggest the death in open court or file a petition with the clerk in vacation, setting up the fact of death and can secure a *scire facias* against the executor, administrator, or heirs, as the case may require, of the deceased defendant; and upon service on such person, can proceed with the case against him. If there is administration on the estate, the judgment can not be collected by process from the court rendering it, but must be certified to the proper probate court for payment in due order of administration.¹⁷ "Where there are two or more plaintiffs or defendants, and one or more of them die, if the cause of action survive to the surviving plaintiffs against the surviving defendants, the suit shall not abate by reason of such death, but upon suggestion of such death being entered upon the record the suit shall, at the instance of either party, proceed in the name of the surviving plaintiffs or against the surviving defendants, as the case may be."¹⁸

The ancient common law doctrine of survivorship in joint contracts or other joint interests has never been the law in Texas, and this statute would seem to have no application in case of plaintiffs except in suits by partners and possibly by joint tenants in possessory actions. The surviving partner or partners can sue on partnership debts,¹⁹ and if suit had been brought by partners and one of them should die, the survivor could proceed with the case without bringing in the representatives of the deceased²⁰ though he may do the latter if he prefers.²¹

As regards defendants, this article in connection with articles 1257-

¹⁷ Rev. Stats. 1895, art. 2332.

¹⁸ Rev. Stats. 1895, art. 1250.

¹⁹ *Watson v. Miller*, 55 Texas, 290.

²⁰ *Dunman v. Coleman*, 59 Texas, 204.

²¹ *Gunter v. Jarvis*, 25 Texas, 582.

1259 has a far reaching effect, which has already been considered in the chapters on Parties,²² and is further treated in concluding portions of this chapter.

Article 1249 authorizes the substitution of the successor in the representation of the estate, or of the heirs in case no further administration is necessary, upon the death of an administrator or executor pending a suit, whether he be plaintiff or defendant.

Articles 1252 and 1253 prevent the abatement of a suit by reason of the marriage of a *feme sole*, whether she be plaintiff or defendant; and provide for bringing the husband into the suit. The process is simple and needs no explanation.

Article 1254 gives to the real party for whose benefit the suit is being prosecuted in the name of another the right to come in upon the death of the original plaintiff and conduct the suit.

If the interest of the party desiring to come in does not appear on the record, the heirs or representatives of the deceased party must be brought in and the questions of right between them ascertained.

Article 1250 relates to suits for damages for injuries resulting in death brought by designated persons given that right by the Constitution and statutes. Such a suit may be brought by any one or all or by any number of the statutory beneficiaries, but must be brought for the benefit of all interested.²³ If suit has been brought by one of these parties and he dies, this statute gives the right to any one or all the other beneficiaries to substitute themselves as plaintiffs and proceed with the suit. To the same effect is article 3024. When the last person entitled as plaintiff dies the suit abates.²⁴

Article 1251 prevents abatement of suit by reason of death of either party occurring between verdict and judgment. This statute does not seem to have been passed upon by the higher courts. The rule announced in it has been frequently enforced in other States, even without statutory authority,²⁵ and there seems to be no doubt as to the validity of the judgments so rendered.

ABATEMENT UPON DISSOLUTION OF A CORPORATION.

The dissolution of a private corporation may be effected in several ways,—first, by expiration of time fixed for its continuance; second, by forfeiture of its charter; third, by voluntary surrender of its charter

²² Supra.

²³ Infra, Parties.

²⁴ Rev. Stats. 1895, art. 3025.

²⁵ In re Cook's Estate (Col.), 1 L. R. A., 567, and notes; Heiker v. Kelley (Ind.), 15 L. R. A., 622.

and acceptance of same by the State; and fourth, by repeal of the charter where this right is reserved by the State in making the grant.

At common law the effect of dissolution, no matter how brought about, was to abate all suits for or against the company. Neither stockholders nor creditors had any further rights in the property and the liabilities of all its debtors were discharged. Personal property escheated to the government and real property reverted to the grantors.²⁶ No cause of action either for or against the corporation survived its death. Courts of equity years ago repudiated this doctrine, and the substantive rights of creditors and the liabilities of debtors are not now more affected by the dissolution of a corporation than by the death of a natural person. The courts of Texas have uniformly held that upon the recognized insolvency of a corporation or upon the dissolution thereof the assets of the concern are a "trust fund" for the benefit of creditors and stockholders, to be administered for them through the corporate officers,²⁷ or by a receiver appointed by some court having jurisdiction.

The statutes, while they do not provide for all contingencies, indicate the same policy.²⁸

The exact effect of these statutes is in some instances hard to determine. It has been held by our Supreme Court that they do not apply to a foreign corporation doing business in this State, and that suit against such a company abates upon the dissolution of the company.²⁹ The court did not deem it necessary to decide whether this was a common law abatement, cutting off the right of recovery, or an equitable one, allowing such a right, since under the facts of the case the equitable right to revive was lost by lapse of time, if it had ever existed.

There have been no authoritative constructions of these acts as to domestic corporations. If the dissolution is occasioned by forfeiture of the charter judicially declared, the statutes contemplate the appointment of a receiver by the court adjudging the forfeiture and the settlement of all the affairs of the company by him under the supervision of the court.³⁰

It is the judgment of forfeiture that terminates the life of the corporation and until that judgment takes effect the corporation may sue and be sued as such.³¹

²⁶ Thompson on Corp., secs. 6718 et seq.; Morowitz on Corp., sec. 1031; Clark on Corp., 248, et seq.

²⁷ Lyons Thomas Hardware Co. v. Perry Stove Mfg. Co., 86 Texas, 143, 24 S. W., 16.

²⁸ Rev. Stats. 1895, arts. 680, 682, 683, 684, 4554, 4555, 4556.

²⁹ Life Assn. v. Goode, 71 Texas, 94, 8 S. W., 639.

³⁰ Rev. Stats. 1895, art. 1465, et seq.; Railway Company v. State, 75 Texas, 434, 12 S. W., 690.

³¹ Receiver v. Stanton, 86 Texas, 628, 26 S. W., 615.

The statutes make no express provision as to the details of the practice, and no decision has declared just what should be done; but it seems that the proper practice, upon the forfeiture of the charter and the appointment of a receiver, is for the receiver to appear voluntarily as the representative of the company in all pending litigation, and if he does not do so, then for the opposite party to suggest the forfeiture to the court in which the suit is pending, and if the company is plaintiff, on failure of the receiver to make himself a party, have the suit abated for want of prosecution, or if the company is defendant, have the receiver made a party. It must be remembered that it is the dissolution of the company and not the appointment of a receiver that is ground for abatement; and if there is no judgment of forfeiture, the appointment of a receiver for other reasons does not abate the suits pending against the company.

It is said that the special acts of incorporation or the general enabling act under which the company is formed may be so worded that certain acts or omissions designated shall *ipso facto* work a forfeiture of charter. Such causes would not come under the conditions just considered, but would be more analagous to dissolution by lapse of time. There are no adjudications in this State on this subject. The practice in these cases would probably be governed by the rule laid down in article 682. It is true that this article, in terms, applies only to corporations "already in existence," and that the right to revive litigation pending at the time of the dissolution is not expressly given. The officers of the defendant company are, however, made trustees with full power to settle its affairs and to maintain and defend any judicial proceedings regarding the assets, and this would seem to be broad enough to cover the continuation of pending suits. There is a special statute regarding sold out railroad companies which makes the directors or managers of such companies trustees to wind up their affairs, unless some one else be legally appointed. In such cases there is express authority for the substitution of these trustees as parties in pending suits.³²

In cases of surrender of the charter and acceptance of it by the State, and of legislative repeal of the charter, the acts of acceptance or repeal usually make special provision for winding up the affairs of the company.

The death of a natural person, party to a suit in which a corporation is also a party, has, of course, just the same effect as if the other party were a natural person.

³² Rev. Stats. 1895, arts. 4555, 4556.

PENDENCY OF ANOTHER SUIT AS GROUND FOR ABATEMENT.

At common law, if a suit were pending between parties, this precluded the same parties from instituting and maintaining between themselves another suit on the same cause of action in the courts of the same government. This rule is not enforced here, and, if a second suit is brought in a court deriving its authority from the same sovereign as that in which the first is pending and a plea in abatement is filed because of the pendency of the first, the court will compel the party to elect which suit he will proceed with and to dismiss and pay the costs of the other.³³

It is held by the Court of Civil Appeals of the Third District that Federal courts in this State and the Texas courts do not come within this rule and the plea of pendency of a suit for the same cause of action between the same parties in a Federal court is not good in the abatement of the suit in the State court.³⁴

INSANITY AS GROUND FOR ABATEMENT.

There are no statutory provisions on this subject. All persons are presumed to be capable of conducting litigation involving their rights and liabilities. If any particular person be legally incapable, this fact must be made known to the court. If the incompetent has been adjudged insane by a court of competent jurisdiction and a guardian appointed, all litigation regarding his estate should be conducted by his guardian. If suit should be brought by or against the incompetent personally, the fact of his incapacity and its adjudication and the appointment of a guardian should be suggested, and the guardian be made a party. If the facts are shown and the guardian will not come in as plaintiff, the suit should be dismissed. If the incompetent be a defendant and the plaintiff will not make the guardian party, the case should be dismissed.

If there has been no adjudication of insanity, the suggestion of incompetency should be made to the court. If it is perfectly apparent, or if from the evidence heard by the court the judge is satisfied that the party is not mentally capable of understanding and appreciating the case and of conducting the litigation, the suit should be stayed until the proper parties are made. If the incompetent party is the plaintiff, the practice is not absolutely settled. The best course is to secure letters of guardianship in the proper probate court and substitute the guardian in his official capacity for the plaintiff. It is not certain whether or not the

³³ *Payne v. Benham*, 16 Texas, 367; *Trawick v. Martin Brown Co.*, 74 Texas, 522, 12 S. W., 216.

³⁴ *Railway Co. v. Barton*, 57 S. W., 292.

court could permit the litigation to be conducted by a next friend or a guardian *ad litem*, though this would seem in many instances admissible.

If the incompetent is a defendant, the statute provides for his representation by a guardian *ad litem*.³⁵

In *Texas & Pacific Railway Company v. Bailey*,³⁶ decided before the amendments were passed extending community administration to cases of insanity of one of the spouses, it was held that when the husband had brought suit on a community demand and had afterwards become insane, the wife could not continue the litigation in her own name. Whether or not she might have done so as next friend of her husband was expressly left undecided.

If either party becomes insane pending the litigation and after active jurisdiction has been secured over his person, if no suggestion of such fact is made to the court, and it proceeds and renders judgment in the case, the judgment so rendered is not void but voidable, and can be set aside only by direct proceedings brought before the expiration of two years after the removal of the disability.^{36a}

DISCONTINUANCE.

Articles 1256, 1257 and 1259 must be considered together and in connection with articles 1203 and 1204. Their combined effect is to change very radically, if not to set aside entirely, the common law rules as to joinder of parties defendant. The first clause of article 1203 reads as follows: "The acceptor of any bill of exchange or any other principal obligor in any contract may be sued either alone or jointly with any other party liable thereon." Article 1256 permits the plaintiff in a suit in which all the defendants are principal obligors to discontinue the suit as to any defendant who has not been served, and to proceed to judgment against the others. Article 1259 gives the same rules in some cases in which all the defendants have been served. So that it is optional with the plaintiffs what number of the principal obligors on the contract on which the suit is based they may sue in the first instance. Our courts have held, and properly, that these statutes do away with, so far as the parties defendant to litigation are concerned, the distinction between joint and several obligations.³⁷ Different rules, however, prevail in suits against principal obligors and those secondarily liable. Here, before the party secondarily liable can be sued without joinder of the prin-

³⁵ Rev. Stats. 1895, art. 1211.

³⁶ 83 Texas, 23, 18 S. W., 481.

^{36a} *Murchison v. White*, 54 Texas, 78; *Flemming v. Seeligson*, 57 Texas, 530; *Brown v. Rentfro*, 57 Texas, 330.

³⁷ *Wooters v. Smith*, 56 Texas, 198; *Keesey v. Old*, 82 Texas, 22, 17 S. W., 928.

cipal, or can be compelled to litigate further after the discontinuance of the suit against the principal obligor, certain exceptional conditions must be both plead and proved. It must be shown that the principal obligor lives beyond the limits of the State or in such part of the State that he can not be reached by ordinary process of law, or that his residence is unknown and can not be ascertained by use of reasonable diligence, or that he is dead, or is actually and notoriously insolvent. If any one of these conditions exist as to one or more of the principal obligors, he or they need not be sued, or if sued, the suit may be discontinued as to him or them and proceeded with against the other principal obligors, if any, or against the party secondarily liable, or both, as the case may be. It is therefore important to know who are principal obligors and who parties secondarily liable as sureties, etc. The general, if not universal rule, regarding commercial paper of all kinds is that, in the absence of fraud, the liability of all parties to such paper is to be determined by the written instrument read in the light of the accepted rules of the interpretation of the law merchant. On such paper every one has just such liability to the payee as the paper itself imports, unless the parties seeking to enforce the obligation are guilty of some fraud in connection therewith. Oral testimony will not be received to show that, in fact, the obligor was liable to the payee in some other way. Thus, if one's name appear on a note as principal, he is not ordinarily permitted, as against the payee, to prove by parol that he is only a surety, so that he may avail himself of these articles.³⁸ These rules do not apply in suits between the makers of notes to adjust their equities, and in cases of that sort parol evidence may be received to show the real facts. If the paper is not negotiable the rule is that the actual relations of the parties may be shown, unless the person seeking to do so is estopped by his previous conduct.

When Discontinuance May be Made.

The discontinuance of the plaintiff's case may be made at any time, either before the call of the docket, when the case is called, or during the progress of the trial. It must, however, be entered in the record before or in the final judgment, so that the record will show a conclusive disposition of the case as to all the parties.³⁹ Upon payment of all costs which may have accrued, discontinuance may be made in vacation.⁴⁰

³⁸ *Ritter v. Hamilton*, 4 Texas, 325; *Lewis v. Riggs*, 9 Texas, 165; *Ennis v. Crump*, 6 Texas, 85; *Head v. Cleburne B. and L. Assn.*, 25 S. W., 810.

³⁹ *Martin v. Crow*, 28 Texas, 614; *Rodriguez v. Trevino*, 54 Texas, 198; *Whitaker v. Gee*, 61 Texas, 217; *Railway Co. v. Scott*, 78 Texas, 360, 14 S. W., 791.

⁴⁰ Rev. Stats. 1895, art. 1258.

The plaintiff can discontinue only his own case, not the defendant's; so, if a cross-action has been filed, he has no control over that, and can be compelled to remain in court and litigate the issues properly tendered in such action.⁴¹ The cost of bringing in the party as to whom the discontinuance is entered is on the plaintiff. The effect of a discontinuance is to terminate that suit between the parties. It is not a final disposition of the case on its merits, and does not prevent the bringing of another suit between the parties on the same cause of action.

⁴¹ Rev. Stats. 1895, arts. 1260, 1301.

APPENDIX.

RULES FOR THE COURTS OF TEXAS.

ADOPTED BY ORDER OF THE SUPREME COURT, OCTOBER 8, 1892, AS
AMENDED BY ORDER OF THE SUPREME COURT, JUNE 29,
1895, AMENDED NOVEMBER 8, 1897, DECEMBER
22, 1898, AND FEBRUARY 7, 1901.

NOW IN FORCE, FEBRUARY 7, 1901.

RULES FOR THE SUPREME COURT.

1. Applications for writs of error shall consist of a petition addressed to this court, embracing specific assignments of error confined to the points of law presented in the motion for rehearing in the Court of Civil Appeals; of the original papers containing the conclusions of law and fact and of the latter court (including their statement of the case and opinion) and of the original motion for a rehearing, all of which original papers, as well as the transcript of the proceedings in the trial court, and a transcript of the orders and judgment of the Court of Civil Appeals, and the briefs filed therein, shall accompany the petition. A motion for a rehearing must be made in the Court of Civil Appeals and overruled before applying for a writ of error. The petition for the writ shall be as brief as practicable, and need only contain the requisites prescribed by the statute. The statement of the case by the Court of Civil Appeals, their conclusions of fact and law, and their opinion will be deemed a part of the petition without being referred to therein, and if it appear therefrom that the case belongs to the class over which as a general rule the jurisdiction of the Court of Civil Appeals is not made final by the statute, and that the judgment has been affirmed, the facts to show jurisdiction in this court need not be alleged, but if it appear therefrom that the case belongs to either of the classes over which as a general rule the Courts of Civil Appeals have final jurisdiction, or that the judgment has been reversed with an order remanding the case, then the petition must contain averments showing that the case comes within some one of the exceptions contained in the statutes, so as to make the jurisdiction of this court apparent. The opinion together with the statement of the case and the conclusions of the

Court of Civil Appeals will be read by the court in connection with the application, so that no matter will be stated in the petition which appears in such statements, conclusions and opinion. If in the opinion of counsel the statement of the case as made by the Court of Civil Appeals is sufficiently full and accurate to present properly the questions to be determined by the court, no additional statement should be made under any assignment; but if not, then under each assignment counsel will make a statement, pointing out the alleged omissions, inaccuracies or errors in the court's statement and conclusions of fact so far as may be deemed necessary to properly present the question raised by such assignment, and will support it by reference to the transcript of the proceedings in the trial court. The reference shall cite the particular part or parts of the transcript relied upon, noting the page and line, both of the beginning and of the ending of the matters referred to. Each assignment and statement, if there be any, may be followed by such argument and citation of authority as counsel see proper to present.

2. The clerk of this court shall receive all applications for writs of error, and file the petition and accompanying transcript from the Court of Civil Appeals, and enter the case upon the docket kept for that purpose, known as the application docket. But he shall not be required to take the same from the postoffice or an express office unless the postage or express charges, as the case may be, shall have been fully paid. The cases shall be numbered consecutively on the application docket and the number shall be placed upon the application.

3. The application, when filed in accordance with law, shall be deemed submitted to the court and ready for disposition, unless the applicant shall file with his petition a request for time in which to present a brief written argument, in which case a period of time not exceeding ten days may be allowed him for that purpose. The applicant should he so select, may cite his authorities in his petition or may file a separate brief or argument.

4. Upon a refusal by this court of an application for a writ of error, the clerk of this court shall transmit with the least practicable delay to the clerk of the Court of Civil Appeals to which the writ of error was sought to be sued out, a certified copy of the order of this court denying such application; and shall return all the file papers of that court to the clerk thereof, but shall not return the petition for the writ or error.

5. If the application be granted, the clerk shall issue a writ of error to the judges of the court, the judgment of which is sought to be revised, advising them that the writ of error has been granted, and the clerk shall also issue a citation to the defendant or defendants in error, or to his or their attorneys of record, notifying him or them that the writ of error has been granted and of the date thereof, and to appear and defend the same. Said citation shall be returnable in ten days, and in the event it be not served, the clerk shall issue other successive citations until due service is had. Service of the citation upon one attorney will be deemed service on all parties represented by him.

If no bond be required the citation and writ of error shall issue immediately upon the granting of the application. If a bond be required the writ shall issue upon receipt of the duly certified copy of the bond prescribed by the statute. Unless further time be allowed by special order of the court in the particular case the certified copy must be filed in this court within ten days from the granting of the application. If the copy be not so filed, the application will be dismissed by the court of its own motion.

5a. Whenever in any case in which a writ of error has been granted or in which such writ may hereafter be allowed, it shall be made to appear to the clerk of this court by the affidavit of a plaintiff in error, his agent or attorney, that the defendant in error has no attorney of record and either that he is beyond the limits of the State or that his residence is unknown, so that it is impracticable to serve citation upon him in the ordinary method provided by law, it shall be the duty of the clerk of this court upon the plaintiff in error making provision for the payment of the expense thereof, to cause notice of the granting of the writ to be published once each week for four successive weeks in some newspaper published in the county in which the case was tried; or a notice of the granting of the writ may be issued by the clerk of this court and may be served upon the defendant in error and returned in the manner provided in articles 1230, 1232 and 1233 of the Revised Statutes, except no copy of the petition for the writ of error need be served. Notice given in either of the two modes herein provided shall have the same effect as service of citation, as provided in rule 5; and the publication or service of notice may be proved by the affidavit of any person, deposited with the clerk and filed among the papers in the cause.

6. When service of the citation in error shall have been had, it shall be the duty of the clerk to put the case upon the trial docket and to mark upon the file the number of the case as shown upon such docket. Cases upon the trial docket shall be numbered consecutively in the order in which they are entered thereon.

7. Causes in this court will be regularly submitted on Thursday of each week, though a case may be set down for submission upon another day by the permission or direction of the court.

8. A case shall stand for submission upon the first regular day of the submission of causes coming after the expiration of twenty days from the day on which the writ of error shall have issued; provided, the citation in error shall have been served ten days before such submission day. If not so served then the case shall be subject to submission on the first regular submission day which falls ten days after service of the citation.

9. Motions in a case not submitted will be heard on the day next preceding the submission day for such case and the adverse party will be required to take notice of all motions filed in the cause on or before the Tuesday immediately preceding such submission day. Notice shall be given of all motions filed after that time.

10. The clerk shall keep a motion docket upon which shall be entered every motion as soon as filed. The motions shall be numbered consecu-

tively upon the docket and its number shall be placed upon the motion itself.

11. A party who elects to file in this court a brief in addition to the brief filed in the Court of Civil Appeals, shall comply as near as may be with the rules prescribed for briefing causes in the latter court, and shall confine his brief to the points raised in the motion for a rehearing and presented in the application for a writ of error.

12. When any Court of Civil Appeals shall certify to this court any question for determination, or shall send to this court any cause upon a certificate of dissent, either upon its own motion or that of any party, the certificate, in either case, shall be accompanied by the briefs filed in the Court of Civil Appeals; and the clerk of this court shall, upon the receipt of the briefs, issue notices to the attorneys whose names appear thereon of the day on which the question or cause, as the case may be, shall be set down for submission.

13. The rules prescribed for the Courts of Civil Appeals as to the custody of transcripts, the argument of causes and as to the notices to attorneys of the disposition of cases, shall govern in this court.

14. When a certified question from a Court of Civil Appeals is presented to the clerk of this court, he will file and docket it and send it at once to the consultation room. If the court should determine that the question is not properly certified under the statute, so as to give jurisdiction to answer it, it will be dismissed without a hearing. Otherwise it will be set down for argument on a day to be fixed by the court in regular session.

15. Parties desiring a writ of *mandamus* from this court are required to cause the petition therefor to be presented to the clerk of the court, accompanied with a motion that the same be filed and set down for a hearing, and also accompanied with such written argument in behalf of the motion as may be desired. The motion will be filed, and, together with the petition and argument, if any, will be sent at once to the consultation room for the action of the court. If the court should be clearly of opinion that upon the facts stated in the petition the writ should not be awarded, the motion will be denied by an order made in open court and entered upon the minutes. Should the court not be of that opinion, an order will be passed and entered, requiring the petition to be filed and fixing a day for the hearing of the cause.

The relator shall also file with his motion, a bond with two or more good and sufficient sureties, to be approved by the clerk of this court, in the sum of fifty dollars; or, in case he be unable to pay the costs, or give security therefor, an affidavit in lieu of such bond. Such bond shall be conditioned, or in case of an affidavit, the affidavit shall be such as is required by the statutes for cost bonds or affidavit in lieu thereof in suits in the district court.

RULES FOR THE COURTS OF CIVIL APPEALS.

TRANSCRIPTS.

1. The clerks of the Courts of Civil Appeals shall receive the transcripts delivered and sent to them, and receipt for the same if required, but they shall not be required to take a transcript out of the postoffice, or an express office, unless the postage or charges thereon be fully paid. Upon receipt of the transcript it shall be the duty of the clerk to examine it in order to ascertain whether or not, in case of an appeal, notice of appeal and a proper appeal bond or affidavit in lieu thereof (where bond is required) have been given; and in case of a writ of error, whether or not the citation in error appears to have been duly served, and error bond or affidavit in lieu thereof (where such bond is required) appears to have been filed. If it seems to him that the appeal or writ of error has not been duly perfected he shall note on the transcript the day of its reception and refer the matter to the court. If, upon such reference, the court shall be of opinion that the transcript shows that the appeal or writ of error has been duly perfected, they shall order the transcript to be filed as of the date of its reception. If not, they shall cause notice of the defect to issue to the attorneys of record of the appellant or plaintiff in error, as the case may be, to the end that they may take steps to amend the record, if it can be done, for doing which a reasonable time shall be allowed. If the transcript do not show the jurisdiction of the court, and if after notice it be not amended, the case shall be dismissed.

2. The clerk shall indorse his filing upon the transcript, of the date of its reception, if it comes to his hands properly indorsed, showing who applied for it, and to whom it was delivered, if presented within ninety days from the time the appeal or writ of error is perfected. But if it comes to his hands after the said date, or not so properly indorsed, he shall, without filing it, make a memorandum upon it of the date of its reception, and keep it in his office, subject to the order of the person who sent it, or to the disposition of the court. Said transcript shall not be filed until a satisfactory showing has been made to the court for its not being properly indorsed, or for not being received by the clerk in proper time; and upon this being done, it may be ordered by the court to be filed, upon such terms as may be deemed proper, having respect to the rights of the opposite party.

3. Either party may file the transcript for which he has applied to the district clerk, and which has been delivered to him; both of which facts must appear on the transcript by the indorsement of the district clerk. If the indorsement shows that it was applied for by one party and delivered to the other, it must be shown by the indorsement of the clerk, or otherwise, to entitle it to be properly filed as the transcript of the party to whom it was delivered, and that it was delivered to one by the consent of the other, as each party has the sole right to the transcript which he applied for to be made out for him; and if it is

so filed, without that fact being shown, the court may strike the case from the docket as improperly filed, upon its own inspection, or upon the motion of the party to whom the transcript belonged.

4. If both parties file transcripts within the proper time—which they may do—and that of the appellant or plaintiff in error is properly made and indorsed, it shall be regarded by the court as the transcript of the record in the case, and the court will grant the appellee or defendant in error leave to withdraw that filed by him for his own use.

5. If but one party file his transcript in proper time, that shall be regarded as the transcript of the record in the case.

6. From the time when the transcript, properly made out and indorsed, is filed, it will cease to belong to either party, but will become a record of the court, subject to its control and disposition.

7. Transcripts in appeals from judgments in proceedings in *quo warranto* shall be filed in the Court of Civil Appeals within twenty days after appeal is perfected, and the first Tuesday following such twentieth day shall be the day for filing motions in such cases.

7a. If the transcript when filed in the Court of Civil Appeals shall not be indexed, as required by rule 92 of the rules for the government of the district courts, the Court of Civil Appeals may cause a proper index to be made by the clerk of their court, and shall cause the costs of the same to be taxed against the plaintiff in error or appellant, as the case may be.

MOTIONS.

8. All motions relating to informalities in the manner of bringing a case into court, shall be filed and entered by the clerk on the motion docket at least forty-eight hours before 10 o'clock a. m. of the day on which "the cause is set for a hearing," under section 23 of the act entitled "An act to organize the Courts of Civil Appeals, to define their jurisdiction and powers, and to prescribe the mode of procedure therein," approved April 13, 1892; otherwise the objection shall be considered as waived if it can be waived by the party; such filing and docketing will be sufficient notice of the motion.

9. Motions to dismiss for want of jurisdiction to try the case, and for such defects as defeat the jurisdiction in the particular case, and can not be waived, shall also be made, filed and docketed at said time, which filing and docketing shall be notice of the motion; *provided*, however, if made afterwards, they may be entertained by the court, after such notice to the opposite party as the court may deem proper to have been given under the circumstances.

10. Motions, made either to sustain or defeat the jurisdiction of the court, dependent on facts not apparent in the record and not *ex officio* known to the court, must be supported by affidavits or other satisfactory evidence

11. Motions for *certiorari* to perfect the record shall also be made in the time required in rule 8. They must be accompanied with a sworn statement showing a necessity for the same, unless the record shows it,

the filing and docketing of which shall be notice of the same. If made afterwards, they will be entertained only upon such terms and upon such notice as the court may deem proper. Unless reason appear to vary the rule, the party applying, in all cases, will be taxed with the costs.

12. Motions made to postpone the case to a future day, or to continue it until the next term, unless consented to by the opposite party, shall be supported by sufficient cause, verified by affidavit, unless such sufficient cause is apparent to the court.

13. The motion docket shall be called on the day of each week next before the day set apart for the submission of causes, when the motions filed and docketed according to the preceding rules will be in order for submission at the instance of either party; and if not submitted then, may be submitted at the regular call of the trial docket, unless sooner called up and disposed of.

14. The arguments of counsel upon all motions shall be confined to a brief explanation of the grounds in the motion, so as to make them intelligible to the court, with a reference to the statutes and decisions relating thereto, unless further argument is requested by the court.

15. The clerk, upon filing and docketing a motion, will indorse upon the motion its number and the number of the case to which it belongs, which shall also be entered in the motion docket, together with the attorney's name who makes the motion. Any opposition in the way of answer to said motion by the opposite party may be filed, and in like manner indorsed and noted in the motion docket, and the name of the attorney therein entered.

THE DOCKET.

16. The clerk, before the regular call of the trial docket, shall have the file number indorsed on each transcript. Where briefs have been filed in a case, the name of the attorney or attorneys signed to the brief shall be entered by the clerk on the trial docket, opposite the name of the appropriate party, and that shall indicate to the court who appears for such party in the cause.

17. The clerk shall not make such entry of an attorney's name until he shall have filed his briefs; but he shall permit any attorney who desires to make an appearance in the case before he files his briefs, or without filing them at all, to place his name, in his own handwriting, upon the trial docket, opposite the name of the party for whom he appears, and that shall be regarded by the court as having whatever effect is given to the mere appearance of a party to a case in court without brief filed.

18. The court will not enter upon the docket the names of attorneys in a case, but counsel desiring their names entered shall see that it is done under the foregoing rule before the case is called.

19. Counsel desiring to call attention of the court to a case on the motion docket or trial docket, not then called in its regular order, must, before doing so, provide himself with the number of the case on the docket.

CALLING THE DOCKET.

20. The trial docket will be called in regular order, according to the filing of the cases as they stand thereon, commencing with the first of those that have not been previously submitted, but the court shall not be required to take the submission of a case until the business on hand will admit of a prompt disposition after the submission has been taken.

21. Upon the call of the trial docket for the submission of cases, either party may submit a cause if it appears to have been properly prepared for submission on his part, unless, for good cause, the court shall postpone the hearing to a further day, or by agreement of counsel to a future day of the term, which will not be done so as to interfere with the business of the court. This rule is subject to exceptional cases given a preference to under some law or rule of the court, and to the action of the court on motions for the postponement and continuance of causes.

PREPARING A CAUSE FOR SUBMISSION.

22. A cause will be properly prepared for submission only when a transcript of the record exhibits a cause prepared for appeal in accordance with the rules prescribed for the government of the district and county courts, and filed in the court under the rules, with briefs of one or both the parties, in accordance with the rules for the government of the court.

23. Said record should contain an assignment of errors as required by the statute. If it does not the court will not consider any error but one of law that may be apparent upon the record, if the judgment is one that could legally have been rendered in the lower court and affirmed in the appellate court.

24. The assignment of errors must distinctly specify the grounds of error relied on, and a ground of error not distinctly specified, in reference to that which is shown in the record, or not specified at all, shall be considered as waived, unless it be so fundamental as that the court would act upon it without an assignment of errors, as mentioned in rule 23.

25. To be a distinct specification of error, it must point out that part of the proceedings contained in the record in which the error is complained of, in a particular manner, so as to identify it, whether it be the rulings of the court upon a motion, or upon any particular part of the pleadings, or upon the admission or the rejection of evidence, or upon any other matter relating to the cause or its trial, or the portion of the charge given or refused, the fact or facts in issue which the evidence was incompetent or insufficient to prove, the insufficiency of the verdict or finding of the jury, if special, and the particular matter in which the judgment is erroneous or illegal, with such reasonable certainty as may be practicable, in a succinct and clear statement, considering the matter referred to.

26. Assignments of error which are expressed only in such general

terms as that the court erred in its rulings upon the pleadings, when there are more than one, or in its charge, when there are a number of charges, or the verdict is contrary to law, or to the charge of the court, and the like, without referring to and identifying the proceeding, will not be regarded by the court as a compliance with the statute requiring the grounds to be distinctly specified, and will be considered as a waiver of errors, the same as if no assignment of errors had been attempted to be filed.

27. In cases submitted to the judge upon the law and facts, the assignments of error shall be governed by the same rules as in other cases, and the party desiring to appeal should, as a predicate for specific assignments of error, request the judge to state in writing the conclusions of fact found by him separately from the conclusions of law. And in agreed cases under the statute the foregoing rules as to assignments of error shall be complied with as far as practicable.

28. There will be no assignments of error allowed in the appellate court when none has been filed in the lower court, unless by consent of parties.

BRIEFS.

29. The appellant, or plaintiff in error, in order to prepare properly a case for submission when called, shall have filed a brief of the points relied on in accordance with and confined to the distinct specifications of error (which assignments shall be copied in the brief) and to such fundamental errors of law as are apparent upon the record, each ground of error being separately presented under the proper assignment; and each assignment not so copied and accompanied with its appropriate propositions and statements, shall be regarded as abandoned. The assignments as presented in the brief shall be numbered from the first to the last in their consecutive order; but it is not required that they shall be presented in the order in which they appear in the original assignment of errors filed in the office of the clerk of the trial court, and the numbers in such original assignments may be disregarded.

30. The appellant or plaintiff in error in preparing his brief shall make a preliminary statement in general terms of the nature and result of the suit, such, for example, as the following: "This was an action of trespass to try title, which was brought by the appellant against the appellee and in which judgment was rendered for the defendant." This may, at the option of counsel for the appellant or plaintiff in error, be followed by a brief statement of the case and such other matters as may be deemed proper as an introduction to the assignments of error. Then shall follow the assignments. Each point under each assignment shall be stated as a proposition unless the assignment itself may sufficiently disclose the point, in which event it shall be sufficient to copy the assignment.

31. To each of said propositions there shall be subjoined a brief statement, in substance, of such proceedings, or part thereof, contained in the record, as will be necessary and sufficient to explain and support

the proposition, with a reference to the pages of the record. This statement must be made faithfully, in reference to the whole of that which is in the record having a bearing upon said proposition, upon the professional responsibility of the counsel who makes it, and without intermixing with it arguments, reasons, conclusions, or inferences. But an argument bearing only on the propositions submitted may follow each statement. But it shall be neither necessary nor proper to repeat in such statements what has already been presented in the general preliminary statement required by the preceding rule. It shall be sufficient in such case to refer to such preliminary statement by the page or pages of the brief on which the particular matter is found.

32. The propositions, if more than one under one ground of the assignment, shall refer to it, and be stated separately.

33. In a proposition relating to the error of the court in overruling a motion for a new trial or to arrest the judgment, in which there are several grounds, the particular ground or grounds should be referred to with the appropriate explanation; and if the same grounds of error have been presented in other propositions, it will be unnecessary to repeat them.

34. In propositions relating to fundamental errors of law apparent upon the record, enough must be stated to make the error of law which pervades the case obviously apparent, without requiring the court to search through the record to find errors, which they will not do unless properly pointed out, if the judgment is one which the trial court is competent to render in such a case.

35. When the assignments of error are numerous, counsel should present propositions on those which are most important in the determination of the case, waiving those that can not control the result of the decision in this court—amongst which may be classed those involving questions of fact, wherein the evidence is so preponderating, or so conflicting, as that the court, under well-established rules of decision, would not set aside the verdict of the jury or judgment of the court upon them.

36. There should be annexed to each proposition, with its statement, and at the end of it, a reference simply to the authorities relied on, if any, in support of it, in the following order, to wit: The statutes and decisions of this State; the statutes and decisions of the United States, if they are applicable to the case; elementary authorities; other decisions in the American and English courts. In citing decisions, those most nearly in point should be cited first, and they should not, usually at least, be so numerous as to require a waste of time in their examination.

37. The brief of the parties, framed in accordance with these rules, must be signed by the party or his counsel; and if by counsel, it shall appear for and on behalf of what party or parties, by name, it is signed; and the copies thereof filed in the appellate court shall be plainly written or printed, and if it covers more than eight pages of foolscap, they shall be printed.

38. Such brief may be amended by a citation of additional authori-

ties to the respective points or propositions made in it, which must be filed and notice of it given to the counsel for the opposite party, if in attendance, one day before the case is called. No other amendment to the brief shall be allowed by the court, unless it is or can be done without injustice or unreasonable inconvenience being thereby imposed on the other party.

39. The failure of appellant or plaintiff in error to file an assignment of errors and briefs in the lower court, and in the appellate court in the time and in the manner prescribed by law and by the rules, shall be ground for dismissing the appeal or writ of error for want of prosecution, by motion made by appellee or defendant in error, as other motions under rule 8, unless good cause is shown why it was not done in the time and manner as prescribed, and that they have been filed at such time and under such circumstances as that the appellee or defendant in error has reasonably not suffered any material injury in the defense of the case in the appellate court. In deciding said motion, the court will give such direction to the case as will cause the least inconvenience or damage from such failure so far as practicable.

40. When it shall be found that the rules prescribed for the preparation of a case for submission have been fully complied with by the appellant or plaintiff in error, the court will, in its discretion, regard this brief as a proper presentation of the case, without an examination of the record as contained in the transcript, and may found its decision thereon, unless the appellee or defendant in error shall, by the time of calling of the case, file in the appellate court copies of his brief, to be kept there with the transcript, containing his objections, succinctly and definitely, to the grounds of error as presented in the propositions of appellant or plaintiff in error in his brief, taking up each of them in order, and stating such other matters contained in the record, in the mode prescribed for appellant and plaintiff in error; as may sustain his objection to each; to which may be added propositions of his own, supported by like statements of what is in the record, so as to present his view of the case, citing the proceedings in the transcript, with the pages, when practicable, to which he refers in his statements.

41. Whatever of the statements of the appellant or plaintiff in error in his brief is not contested, will be considered as acquiesced in. To each of his said objections or propositions may be annexed his authorities, cited in the order indicated for the brief of appellant or plaintiff in error.

41a. On or before the day fixed for the hearing of the cause as prescribed by section 23 of the act hereinbefore referred to, and before the opening of the court, four copies of the brief of each of the parties required to be filed in the office of the clerk of the trial court, shall be filed with the papers in the cause in the office of the clerk of the court of civil appeals.

42. When the appellant or plaintiff in error has failed to prepare the case for submission, by the omission of what is required after bond or affidavit filed for appeal and for writ of error with citation served, the appellee or defendant in error, before the call of the case, may file in the

appellate court a brief in the manner required of the appellant or plaintiff in error—except that his propositions will be shaped so as to show the correctness of the judgment—which the court may, in its discretion, regard as a correct presentation of the case, without examining the record further than to see that the judgment is one that can be affirmed upon the view of the case as presented by appellee or defendant in error. The appellee or defendant in error shall be entitled to the custody of the transcript after it is filed in the appellate court, for the purpose of preparing his brief.

43. The appellee or defendant in error may submit the record upon a suggestion of delay, upon making a brief statement of the character of the suit, the proceedings therein, and the judgment rendered, which will be required in every case of such submission when appellant or plaintiff in error has filed no brief. If this is done in a case properly prepared for submission by appellant or plaintiff in error, it will be considered an acquiescence in the statement of appellant or plaintiff in error, in his brief, as to the contents of the record, and as merely a denial of the legal consequences contended for by the appellant or plaintiff in error, unless the appellee or defendant in error shall also file a brief, as heretofore provided, which he may do. If the appellant or plaintiff in error has not prepared the case for submission, the record will be examined sufficiently to ascertain that it is or is not properly a delay case, and if found to be a plain case of delay, it will be acted on as such; but if not, it will be reversed or referred back for a brief, or brief and argument, on one or both sides, as may be directed. In deciding under this rule, where the case has not been prepared for submission by the appellant or plaintiff in error, the court will be required to look only to the substantial merits as they may appear in the record.

44. When affirmance is asked upon certificate filed, there need be nothing more than a request for affirmance, signed by the party or his counsel. It shall not be submitted sooner than one week after being filed, if the court should be in session that length of time. The appellee or defendant in error may be heard on a motion to dismiss the certificate, or on a motion to file the transcript of the record, or on a motion to set aside judgment rendered, as in other cases of rehearing.

DEFECTIVE BRIEF.

45. In all cases wherein the brief or briefs are found insufficient, either in a proper presentation of the facts or proceedings in the case, or in the reference to the authorities, so as to enable the court to decide the case the court may set aside the submission and refer it back, with such orders for postponement, filing of briefs, reference to authorities, by one or both parties, and reargument, written or oral, as may be deemed proper. If however, one party has fully complied with the rules, and has filed a satisfactory brief that will enable the court to decide the case, and the other party is in default, and has not filed a satisfactory brief in accordance with the rules, the court may, in its discretion, disregard the latter party's brief, as if not filed in the case, and act upon that alone which has been properly filed in accordance with the rules.

AGREEMENTS OF COUNSEL.

46. All agreements of parties or their counsel relating either to the merits or conduct of the case in the court, or in reference to a waiver of any of the requirements prescribed by the rules, looking to the proper preparation of an appeal or writ of error for a submission, shall be in writing, signed by the parties or their counsel, and filed with the transcript or be contained in it, and, to the extent that such agreement may vary the regular order of proceeding, shall be subject to such orders of the court as may be necessary to secure a proper preparation for a submission of the case.

ALGUMENTS OF COUNSEL.

47. When the case is properly prepared for submission, any party who has filed briefs in accordance with the rules prescribed therefor, may, upon the call of the case for submission, submit an argument to the court, either oral or plainly written or printed, which, if written or printed, may be left on file with the transcript, copies of which need not be furnished, unless printed.

48. The arguments must be upon the disputed points, whether of law or fact, in support of the proposition relied on, on one side, and objections and counter-propositions on the other, and it must be confined to them, avoiding any reference or comment upon positions taken in the trial court, or to other extraneous matters not involved in or pertaining to that which is found in the record.

49. In referring to statutes, that part directly bearing upon or relevant to the position, should be read at the bar, or stated in the written or printed arguments, and in citing elementary books or decisions of courts, the principle should be stated, or so much should be read or stated, as bears directly on, or tends to maintain, the proposition for which it is cited in the brief.

50. After the case has been presented to the court by such explanation as may be necessary, each side may be allowed an hour in argument at the bar; with twenty minutes more in conclusion by the appellant; and, after being so presented, if the magnitude or importance of the case or the difficulty of the questions seem to require it, a longer time may be allowed. Not more than two counsel on each side will be heard, except upon leave of the court.

51. If counsel but for one party has filed briefs, an argument by him may be allowed, conformably to the preceding rules, as nearly as practicable, under the direction of the court.

52. Counsel who argue a case at the bar will be expected to be able to answer questions propounded by the members of the court, relating to the matters contained in the record, and to the laws or authorities cited in the argument.

53. Should it be apparent during the progress of the trial, or afterwards, that the case has not been properly prepared, as shown in the transcript, or properly presented in the brief or briefs, or that the law

and authorities have not been properly cited, which will enable the court to decide the case, it may decline to receive the submission, or, if received, may set it aside and make such orders as may be necessary to secure a more satisfactory submission of the case; or should it appear to the court, after the submission of the cause, that the statement of the facts has been prepared in violation of the rules, the court may require the plaintiff in error or appellant to furnish four printed copies of such statement of facts, and upon his failure to do so may disregard it. If the violation of the rule be flagrant, the court may disregard the statement of facts altogether, unless counsel for the appellant or plaintiff in error shall make it appear, by affidavit or otherwise, that he prepared a statement giving what, in his opinion, he deemed a fair presentation of the evidence, prepared in accordance with the rules, and that he was unable to get it agreed to or approved. But should counsel for appellant or plaintiff in error show that he has used due diligence to have a proper statement of facts signed and approved, and that the statement of facts as prepared, is the result of the fault of the counsel for the opposite party, such as his failure or refusal to agree to a proper statement presented to him, the costs of printing the statement, if ordered, shall be taxed against the appellee, or defendant in error, as the case may be.

53a. If after the submission of the cause the court find that the transcript is not prepared as required by the rules and that it contains matter which should not have been incorporated therein, the court may in their discretion decline to proceed further with the case, until the appellant or plaintiff in error presents a copy of the transcript from which all foreign matters have been omitted, and the court may, in addition thereto, require that such copy shall be printed, and in case of the failure of such party to comply with the court's order within a reasonable time, to be specified in such order, the case shall be dismissed.

54. When a case has been properly prepared for submission, and a satisfactory oral argument has been made, the court will promptly announce its judgment, if practicable, at the next succeeding session of the court, and, when deemed necessary, deliver a written opinion, if not then, at some time during the term of the court.

CUSTODY OF TRANSCRIPT.

55. Neither the transcript nor any of the papers in a case shall be withdrawn from the custody of the clerk, nor taken from his office or the court room, without a receipt left therefor.

56. Cases, while under submission, either on the merits of the appeal or on motion, are no longer under the control of the attorneys; and, while so under submission, the clerk will not let the transcripts of such cases go out of his office, except on the order of one of the justices of the court. While not under submission, either before submission or after decision, the parties or their attorneys may, by complying with rules 55 and 60, obtain possession of the transcript; provided, however, that when a case has been decided upon the merits of the appeal, no one, except the

losing party or his attorney, shall be allowed to take the transcript out of the clerk's office, until after said party has filed his motion for a rehearing, or until the time for filing said motion has expired.

57. Original papers sent up with the transcript by order of the trial court for the inspection of the appellate court, will be retained in the office, and will not be allowed to go out of the custody of the clerk, except by order of one of the justices of the court, which order must be filed with the papers of the cause.

58. The clerk shall furnish the parties and counsel with an opportunity, when reasonably applied to for that purpose, to inspect the records, judgments, papers, opinions, books and dockets in his office in which they may be interested; but he shall not be required to permit copies thereof to be taken without his consent. He shall, upon tender of reasonable compensation, give certified copies of the records of his office.

59. The clerk shall be responsible for every transcript or other paper, in a cause, that is missing from his office, unless he can produce the receipt of an attorney for the same, or otherwise show, by satisfactory evidence, that some one took it from his custody, or from the court room, without his consent, or that said transcript had passed into the hands of one of the justices of the court, and had not been returned to his custody.

60. No attorney shall take, or suffer to be taken, any transcript or other paper for which he has receipted, out of the reach of the court, so that it can not be produced in court or in the clerk's office when it is needed.

61. The reporter shall have access to the minutes and judgments of the court, and shall have custody of the transcripts, briefs, and opinions so long as it may be necessary to discharge his duties as reporter.

62. In all cases in which appeals or writs of error are dismissed, the appellant, or party filing the transcript, without further leave of the court, shall have the right to withdraw the transcript, unless it contains original papers belonging to an adverse party, in which event leave of court shall be had before such original papers are withdrawn.

REHEARING IN THE COURTS OF CIVIL APPEALS.

63. Motion for rehearing shall be made and conducted strictly in accordance with the statute, which describes the manner of this proceeding.

64. Where a Court of Civil Appeals adjourns for the term within less than fifteen days after the rendition of judgment, the issuance of the mandate shall, unless otherwise ordered, be withheld until the expiration of said period; and if, within that period, an application for rehearing shall be presented to the clerk of the court of that place, the issuance of mandate shall be further withheld to await the action of the court on said application.

65. Upon the rendering of the judgment in the Court of Civil Appeals, as well as upon the making of an order overruling the motion for a rehearing, the clerk shall immediately give notice by a postal card to the attorneys of the respective parties, of the disposition made of the

cause or of the motion, as the case may be, for which service he shall tax the usual fee as a part of the costs in the case. But the mailing of such notices shall not relieve the parties of the responsibility of taking notice of the disposition of the cause or motion, and the failure to receive a notice so mailed shall be no cause for delay in taking such future action as may be desired in reference to the case within the time prescribed by the statutes and rules.

66. Upon the presentation to him of an application for a writ of error, the clerk of the Court of Civil Appeals shall withhold the mandate until properly advised of the disposition of the case by the Supreme Court.

RULES FOR THE COURT OF CRIMINAL APPEALS.

1. The clerk of the Court of Criminal Appeals shall be governed by the rules applicable to the clerks of the Courts of Civil Appeals, except where a different rule may be prescribed by statute.

2. The rules governing motions, arguments of counsel and applications for *certiorari* to complete the record as prescribed by the Courts of Civil Appeals, shall apply to the Court of Criminal Appeals.

RULES FOR THE DISTRICT AND COUNTY COURTS.

PLEADINGS.

1. The pleadings in the district and county courts, shall, as prescribed by statute, be by petition and answer.

2. Pleadings, with the exception of those presenting issues of law, must be a statement of facts, in contradistinction to a statement of evidence, of legal conclusions, and of arguments. Facts are adequately represented by terms and modes of expression wrought out by long judicial experience, perpetuated in books of forms, in law and equity, which though not authoritatively requisite, may generally be adopted as safe guides in pleading. In case of a violation of this rule, to such an extent as to produce confusion, uncertainty and unnecessary length in pleading, the court may require the matter set up to be repleaded, so as to exclude the superfluous parts of it from the record.

THE PETITION.

3. The petition of plaintiff shall consist of an original petition, and such supplemental petitions as may be necessary in the course of plead-

ing by the parties to the suit, to enable the plaintiff to state all the facts presenting his cause of action, and such other facts as may be required to rebut the facts that may be set up in the original and supplemental answers, as pleaded by the defendant. The original petition and the supplemental petitions shall be indorsed, so as to show their respective positions in the process of pleading, as "original petition," "plaintiff's first supplemental petition," "plaintiff's second supplemental petition," and so on, to be successively numbered, named, and indorsed.

ORIGINAL PETITION.

4. The plaintiff, in the original petition, in addition to the names and residences of the parties and the relief sought, may state all of his facts, so as to present together different combinations of facts, amounting to a cause or causes of action, as has been the usual practice, or he may state the cause or causes of action in several different counts, each within itself presenting a combination of facts, specifically amounting to a single cause of action, which, when so drawn, shall be numbered, so that an issue may be formed on each one by the answer.

PLAINTIFF'S SUPPLEMENTAL PETITION.

5. The plaintiff's supplemental petitions may contain exceptions, general denials and the allegations of new facts not before alleged by him, in reply to those which have been alleged by the defendant.

THE ANSWER.

6. The answer of defendant shall consist of an original answer, and such supplemental answers as may be necessary, in the course of pleading by the parties to the suit, to enable the defendant to state all of the exceptions and facts, presenting his defense, as contained in his original answer, or his cross-action, if one be set up in the original answer, and such other facts as may be required to rebut the facts that may be stated in the original and supplemental petitions, as pleaded by the plaintiff. The original answer and the supplemental answers shall be indorsed, so as to show their respective positions in the process of pleading, as "original answer," "defendant's first supplemental answer," "defendant's second supplemental answer," and so on, to be successively numbered, named, and indorsed.

ORIGINAL ANSWER.

7. The original answer may consist of pleas to the jurisdiction, in abatement, of privilege, or any other dilatory pleas; of exceptions, general and special; of general denial, and any other facts in defense by way or avoidance or estoppel, the same being pleaded in the due order of pleading, as required by statute; and it may present a cross-action, which to that extent will place defendant in the attitude of a plaintiff.

Facts in avoidance and estoppel may be stated together, or in several special pleas, each presenting a distinct defense, and numbered so as to admit of separate issues to be formed on them.

SUPPLEMENTAL ANSWERS.

8. The defendant's supplemental answers may contain exceptions, general denial, and the allegations of new facts, not before alleged by him, in reply to that which has been alleged by the plaintiff.

9. The original petition, first supplemental petition, second supplemental petition, and every other, shall each be contained in one instrument of writing, and so with the original answer and each of the supplemental answers.

10. Each supplemental petition or answer, made by either party, shall be a response to the last preceding pleading by the other party, and shall not repeat the facts formerly pleaded further than is necessary as an introduction to that which is stated in the pleading then being drawn up. These instruments, to wit: the original petition and its several supplements, and the original answer and its several supplements, shall, respectively, constitute separate and distinct parts of the pleading of each party; and the position and identity, by number and name, with the indorsement of each instrument, shall be preserved throughout the pleadings of either party.

11. Each party who files a supplement of any number (as first, second, third, and so on), shall give notice thereof by asking leave of the court, and filing the same amongst the papers of the cause, with the appropriate indorsement thereon, indicating its number and name.

AMENDMENT.

12. An amendment may be made by either party, upon leave of the court for that purpose, or in vacation, as prescribed by statute—the object of an amendment, as contradistinguished from a supplemental petition or answer, being to add something to, or withdraw something from, that which has been previously pleaded, so as to perfect that which is or may be deficient, or to correct that which has been incorrectly stated by the party making the amendment.

13. The party amending shall point out the instrument, with its date, sought to be amended, as “original petition,” or “plaintiff's first supplemental petition,” or others filed by the plaintiff, or as “original answer,” or “defendant's first supplemental answer” or others filed by the defendant, and amend such instrument by preparing and filing a substitute therefor, entire and complete in itself, to be styled and indorsed, “amended original petition,” or “amended first supplemental petition,” or “amended original answer,” or “amended first supplemental answer,” and so on, accordingly as said instruments of pleading are designated in rules 3 and 6.

14. Unless the substituted instrument shall be set aside on exceptions, for a departure in pleading, or on some other ground, the instru-

ment for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause, unless some error of the court in deciding upon the necessity of the amendment, or otherwise in superseding it, be complained of, and exception be taken to the action of the court, or unless it be necessary to look to the superseded pleading upon a question of limitation.

15. When either party may have occasion to plead new facts, additional to those formerly pleaded by him, which constitute an additional cause of action or defense permissible in the suit, he shall present it as an amendment to the original petition, or original answer (unless it is in its nature, a response to some pleading of the opposite party), by substitution, with the proper number, name and indorsement, in the same manner as other amendments.

16. When either supplement or amendment made to pleading is of such character, and is presented at such time as to take the opposite party by surprise (to be judged of by the court), it shall be cause for imposing the cost of the term upon, and charging the continuance of the cause (both or either) to the party causing the surprise, if the other party demand it, and shall make a satisfactory showing, or if it otherwise be apparent that he is not ready for trial, on account of said supplement or amendment being allowed to be filed by the court.

EXCEPTIONS TO PLEADINGS.

17. General exceptions shall point out the particular instrument in the pleadings, to wit: the original petition or answer, or the respective supplements to either; and in passing upon such general exception every reasonable intendment arising upon the pleading excepted to shall be indulged in favor of its sufficiency.

18. A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly the obscurity, inconsistency, duplicity, generality or other insufficiency in the allegations in the pleading objected to. The general expression that it is vague, uncertain, and the like, alone shall be regarded as no more than a general exception.

EXHIBITS IN PLEADING.

19. Notes, accounts, bonds, mortgages, records and all other written instruments, constituting, in whole or in part, the cause of action sued on, or the matter set up in defense, may be made a part of the pleadings by copies thereof, or the originals, being attached and referred to as such, in aid and explanation of the allegations in the petition or answer made in reference to said instruments, but will not thereby relieve the pleader from making the proper allegations of which said exhibits may be the evidence, in whole or in part. No other instrument of writing, such as a deed, will, document, record of court, or agreement, which is not sued on as a cause of action by plaintiff, or set up as matter relied on in defense by defendant, but is designed to be

used only as evidence of some fact that is alleged, shall not be made an exhibit in the pleading; and when it shall be so attempted, by attaching such instrument and referring to it as such, the court will, of its own motion, or at the instance of a party, cause the instrument to be detached from the pleading, and adjudge it to constitute no part thereof by an order of court entered of record, at the cost of the party violating this rule, so as to prevent the pleadings from being incumbered with that which is or may be the only evidence in the case.

20. The office of a general denial by the defendant is to throw the burden of proof, as to the allegation denied, on the plaintiff. The defendant can not be permitted under this plea to introduce special matters in avoidance or estoppel, in evidence for his defense. And the same rule prevails when it is filed by plaintiff to facts in the cross-action or answer of defendant.

MOTIONS.

21. The clerk shall keep a motion docket in which all motions, when filed, shall be placed, with the names of the parties and counsel, with the date of filing and its name and the number of the case, which filing shall be considered notice of said motion before the continuance or final disposition of the case for the term, except where it is otherwise provided for by statute.

22. The court will set apart a particular day each week of the term, when the motions previously made, in which proper notice has been given, shall be determined, if urged, unless for good cause they are postponed to a day during the term, or continued by consent to the next term.

23. When notice shall be given of objections to the form or manner of taking and returning depositions, either party may require it to be put on the motion docket and tried as other motions; *provided*, if not tried sooner, it shall be decided before either party shall be required to announce readiness for trial on the facts.

DILATORY PLEAS, MOTIONS AND EXCEPTIONS, WHICH DO NOT GO TO THE MERITS OF THE CAUSE.

24. All dilatory pleas, and all motions and exceptions relating to a suit pending, which do not go to the merits of the case, shall be tried at the first term to which the attention of the court shall be called to the same, unless passed by agreement of the parties with the consent of the court; and all such pleas and motions shall be first called and disposed of before the main issue on the merits is tried.

MOTIONS AND EXCEPTIONS TO MERITS.

25. All motions which go to the merits of the case, and all exceptions, general and special, which relate to the substance or to the form of the pleadings, shall be decided at the first term of the court,

when the case is called in the regular order for trial on the docket, if reached, whether there be an announcement on the facts or not, unless passed by agreement of parties with the consent of the court.

CALL FOR TRIAL.

26. When the case is called for trial, the exceptions, if any remain undisposed of, shall be presented for determination, and shall then be decided before proceeding to the trial of the case on the facts, and if not presented, they shall be adjudged by the court to have been waived, and shall be so entered on the minutes of the court, the cost of filing to be taxed against the party filing them, and they shall constitute no part of the final record, unless some question be raised upon the action of the court in reference to them, and they are presented in a bill of exceptions.

27. When the exceptions have been presented and decided, leave may be granted to either or both parties to file an amendment in one instrument of writing separate from those which have been previously filed by each, which shall close the pleadings in the case to be then determined by the court, so as to decide all the questions of sufficiency arising upon them. In making this amendment, the party shall refer distinctly to such instrument as he desires to amend, by name and number, as in the other amendments, without repleading the whole of it, but shall succinctly state such additional facts to be added thereto as he may desire, and this amendment shall be styled and indorsed, "plaintiff's," or "defendant's trial amendment;" but if the case should not be then tried, the party or parties shall replead, as in other cases of amendment.

28. When the questions of law, if any, have been determined by the court, the judge may, before proceeding to trial, by the aid of the counsel, have the pleadings that have been held sufficient, or have not been excepted to, read over, if deemed necessary, and make a brief memorandum of the facts stated, or issue presented in the pleadings, and may read them out before the trial commences, so as to inform the parties of the view which is entertained by the judge of the matters of fact in issue as presented by their pleadings.

29. The court, when deemed necessary in any case, may order a repleader on the part of one or both parties, in order to make their pleadings substantially conform to the rules.

30. These rules of pleadings shall apply equally, so far as it may be practicable to apply them, to interveners and to parties, when more than one, who may plead separately.

TRIAL OF THE CASE.

31. The plaintiff shall have the right to open and conclude, both in adducing his evidence and in the argument, unless the burden of proof of the whole case under the pleadings rests upon the defendant, or unless the defendant, or all of the defendants, if there should be

more than one, shall, after the issues of fact are settled and before the trial commences, admit that the plaintiff has a good cause of action as set forth in the petition, except so far as it may be defeated, in whole or in part by the facts of the answer constituting a good defense, which may be established on the trial; which admission shall be entered of record, when the defendant, or the defendants, if more than one, shall have the right to open and conclude in adducing the evidence and in the argument of the cause.

32. The court shall not be required to allow a case to go to trial on the facts, when the pleadings are obviously so defective that a material issue has not been formed; and in such case the court shall call the attention of the parties to such immaterial or defective issue, so that the time of the court may not be wasted.

33. A party who abandons any part of his cause of action or defense, as contained in the pleadings, may have that fact entered of record, so as to show that the matters therein were not tried, and he shall be taxed with the cost incurred upon such pleading so abandoned. He shall also be taxed with the cost incurred upon pleading, in support of which no evidence was offered, to be determined by the court on motion at the term of the trial, and not afterwards.

COUNSEL AND ARGUMENTS.

34. Counsel for plaintiff, or for defendant, when he holds the affirmative of the issue, shall have the right to open and conclude, but if he waives the right to open the argument, he shall not have the right to conclude. This rule will apply to motions, exceptions to evidence, and all other matters presented to the court, except in rules to show cause, in which the party called on shall begin and end his cause.

35. An application for first continuance shall not be argued.

36. In all arguments, and especially in arguments on the trial of the case, the counsel opening shall present his whole case as he relies on it, both of law and facts, and shall be heard in the concluding argument only in reply to the counsel on the other side.

37. Counsel for an intervenor shall occupy the position in the argument assigned by the court, according to the nature of the claim.

38. Arguments on questions of law shall be addressed to the court, and counsel shall state the substance of the authorities referred to without reading more from the books than may be necessary to verify the statement. On a question on motion, exceptions to the evidence and other incidental matters, the counsel will be allowed only such argument as may be necessary to present clearly the question raised, and refer to authorities on it, unless further discussion is invited by the court.

39. Arguments on the facts should be addressed to the jury, when one is impaneled in a case that is being tried, under the supervision of the court. Counsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel. Mere personal criticism by counsel upon each other shall be avoided, and, when indulged in, shall be promptly corrected as a contempt of court.

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40. Side-bar remarks, and remarks by counsel of one side, not addressed to the court, while the counsel on the other side is examining a witness, or arguing any question to the court, or addressing the jury, will be rigidly repressed by the court.

41. The court will not be required to wait for objections to be made when the rules as to arguments are violated; but should they not be noticed and corrected by the court, opposing counsel may ask leave of the court to rise and present his point of objection. But the court shall protect counsel from any unnecessary interruption made on frivolous and unimportant grounds.

42. It shall be the duty of every counsel to address the court from his place at the bar, and, in addressing the court, to rise to his feet; and, while engaged in the trial of the case, he shall remain at his place in the bar.

43. But one counsel on each side shall examine and cross-examine the same witness, except on leave granted.

44. No more than two counsel on each side shall be heard on any question or on the trial, except in important cases, and upon special leave of the court.

45. The attorney first employed shall be considered the leading counsel in the case, and, if present, shall have control in the management of the cause, unless a change is made by the party himself, to be entered of record.

46. An attorney of record is one who has appeared in the case, as evidenced by his name subscribed to the pleadings or to some agreement of the parties filed in the case; and he shall be considered to have continued as such attorney to the end of the suit in the trial court, unless there is something appearing to the contrary in the record.

47. No agreement between attorneys or parties touching any suit pending will be enforced, unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

48. Counsel of the party for whom a judgment is to be rendered, shall prepare the form of the judgment to be entered and submit it to the court.

49. Absence of counsel will be no good cause for continuance or postponement of the cause when called for trial, except to be allowed in the discretion of the court, upon cause shown or upon matters within the knowledge or information of the judge, to be stated on the record.

50. No attorney, or other officer of the court, shall be surety in any cause pending in the court, except under special leave of court.

51. Any attorney who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading, presenting a state of case which he knows to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt; and the court, of its own motion, or at the instance of any party, will direct an inquiry to ascertain the fact.

52. After the court has pronounced its opinion upon a question made,

no further argument will be heard; but if counsel think the court has fallen into error as to law or fact, they may submit a statement in writing, which the court will receive and consider.

BILLS OF EXCEPTION.

53. There shall be no bills of exception taken to the judgments of the court, rendered upon those matters, which, at common law, constitute the record proper in the case, as the citation, petition, answer, and their supplements and amendments, and motions for a new trial, or in arrest of judgment and final judgment.

54. The charges of the court that are given, and those asked that are refused, when signed by the judge and filed by the clerk, being made thereby a part of the record by statute, should not, in civil causes, be made a part of a bill of exceptions.

55. The rulings of the court upon applications for continuance and for change of venue, and other incidental motions, and upon the admission or rejection of evidence, and upon other proceedings in the case not embraced in the two preceding rules, when sought to be complained of as erroneous, must be presented in a bill of exceptions, signed by the judge and filed by the clerk, or otherwise made according to the statute, and they will thereby become a part of the record of the cause, and not otherwise.

56. Exceptions to evidence, admitted over objections made to it on the trial, may be embraced in the statement of facts, in connection with the evidence objected to, provided the statement of facts be presented to the judge within the time allowed for presenting bills of exceptions, and be filed in term-time.

57. Exceptions to the admission of evidence on the trial, where no reason is assigned for objecting to it, shall not be sustained where the evidence is obviously competent and admissible, as tending to prove any of the facts put in issue in the pleadings; and in all cases the court, when deemed necessary, may call upon the party offering the evidence to explain the object of its admission, and also upon the party excepting, the reason of his objections, which, when done in either or both cases, may form a part of the bill of exceptions.

58. Exceptions to the admission of evidence, where the ground of objection is assigned, shall be considered in reference to the objection made to it, and the objection shall be stated in the bill of exceptions taken to its admission or exclusion.

59. Bills of exception must state enough of the evidence, or facts proved in the case, to make intelligible the ruling of the court excepted to in reference to the issue made by the pleadings.

60. When exceptions are made to the admission or exclusion of the evidence on the trial before the court or before the jury, the exceptions will be then decided, after such argument as the court may allow, and a memorandum of the point ruled on will then be made by the judge, if the bills of exception are not then prepared and signed, which ordinarily should be done.

CHARGE OF THE COURT.

61. When the pleading of either or both parties contains several combinations of facts, either together or in several counts or pleas, each of which constitutes a cause of action or ground of defense, and is sufficiently supported by the evidence to require a charge, and upon which an issue has been formed, the charge should be so framed as to present to the jury and require a finding by them upon the issue made, upon each of said combinations of facts so contained in the pleadings, which may be necessary to a decision of the case.

62. When a full charge upon the issues has been made, so far as the evidence adduced tending to establish them may require, the court should not encourage the asking of additional charges covering the same ground substantially, and charges asked and not given should not be read in the hearing of the jury, or taken by the jury in their retirement.

JUDGMENT.

63. The entry of the judgment should carefully recite the finding of the jury, or the several findings, if more than one, upon which the judgment of the court is based.

64. The entry of the judgment shall contain the full names of the parties, as stated in the pleadings, for and against whom the judgment is rendered.

65. Judgments rendered upon questions raised upon citations, pleadings and all other proceedings, constituting the record proper as known at common law, must be entered at the date of each term when pronounced.

66. A cause that has been submitted for trial to the judge on the law and facts shall be determined and judgment rendered therein during the term at which it has been submitted, and at least two days before the end of the term, if it has been tried and submitted one day before that time, unless it is continued after such submission for trial, by the consent of the parties placed on the record, and in such event a statement of facts and bills of exception shall be prepared and filed upon a request in writing by either party.

MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT.

67. Each ground of a motion for a new trial or in arrest of judgment shall briefly refer to that part of the ruling of the court, charge given to the jury, or charge refused, admission or rejection of evidence, or other proceedings which are designed to be complained of, in such way as that the point of objection can be clearly identified and understood by the court.

68. Grounds of objections couched in general terms—as that the court erred in its charge, and in sustaining or overruling exceptions to the pleadings, and in excluding or admitting evidence, the verdict

of the jury is contrary to the evidence, the verdict of the jury is contrary to law, and the like—shall not be considered by the court.

69. When the case is determined by the judge without a jury, counsel in making a motion for new trial shall specify succinctly the supposed errors of law or fact, or both, into which the judge has fallen, as far as may be practicable to do so.

70. In motions for continuance, for the change of venue, and other preliminary motions made and filed in the progress of the cause, the rulings of the court thereon shall be considered as acquiesced in, unless presented in a bill of exceptions; and the rulings thereon shall be made a ground of objection in motions for new trial or in arrest of judgment, if they are desired to be relied on as grounds of error.

71. Motions for new trial and in arrest of judgment shall be determined on motion day of each week of the term, unless postponed to the next motion day, or, for good cause shown, to a subsequent day, and not later than two entire days before the adjournment of the court, at which time all such motions previously filed shall be determined.

THE STATEMENT OF FACTS.

72. Where the evidence adduced upon the trial of the cause is sufficient to establish a fact or facts alleged by either party, the testimony of witnesses, and the deeds, wills, records, or other written instruments, admitted as evidence, relating thereto, should not be stated or copied in detail into a statement of facts, but the facts thus established should be stated as facts proved in the case; *provided*, an instrument, such as a note or other contract, mortgage or deed of trust, that constitutes the cause of action, on which the petition or answer, or cross-bill, or intervention is found, may be copied once in the statement of facts.

73. When there is any reasonable doubt of the sufficiency of the evidence to constitute proof of any one fact under the preceding rule there may then be inserted such of the testimony of the witnesses and written instruments, or parts thereof, as relate to such facts.

74. When it becomes necessary to insert in a statement of facts any instrument in writing, the same shall be copied into the statement of facts before it is signed by the judge, and instruments therein only referred to and directed to be copied shall not be deemed a part of the record.

75. Where there is no dispute about, or question made upon, the validity or correctness in the form of a deed, or its record, a will or its probate, record of a court, or any written instrument adduced in evidence, it should be described (and not copied), or its legal effect as evidence stated, as a fact established.

76. When questions are raised on such instruments as are mentioned in the preceding rules, only so much of such parts of them shall be copied into the statement of facts as may be necessary to present the question, and the balance of them shall only be described, or presented, as prescribed in the preceding rule.

77. The commissions, notices and interrogatories in depositions, adduced in evidence, shall in no case be inserted or copied into a statement of facts, but the evidence thus taken and admitted shall appear in the statement of facts, in the same manner as though the witness had been on the stand in giving his evidence, and not otherwise, in form or substance.

78. Neither the notes of a stenographer taken upon the trial, nor a copy thereof made at length, shall be filed as a statement of facts; but the statement made therefrom shall be condensed throughout in accordance with the spirit of the foregoing rules upon this subject.

CLERKS.

79. The clerks of the district and county courts shall keep a court docket, in a well-bound book, ruled into columns, in which they shall enter, in the *first* column, number of case and name of attorneys; *second*, names of the parties; *third*, nature of the action; *fourth*, the pleas; *fifth*, rulings of former terms; *sixth*, the motions and rulings of the present term.

80. The cases shall be placed on the docket as they are filed.

81. The clerk shall at each term make out two copies of this docket, one for the use of the court, and one for the use of the bar.

82. In preparing the court docket, it shall be the duty of the clerk to designate the suits by regular consecutive numbers, called *file numbers*, and he shall mark on each paper in every case, the file number of the cause.

83. In every case appealed to a court of civil appeals, the clerk shall, in making up the docket at each succeeding term, keep the said cause in its proper place on the docket for disposition after being decided; and at the next term after issuing a writ of error, the clerk shall replace the cause on the docket with its original file number.

84. In making a complete record, as prescribed by statute, all the proceedings in the case shall be entered in the order of time in which they occur; *provided*, amended pleadings shall take the place of those for which they are substituted, and the pleading thus superseded (except such as are specified in rule 14), and those that are abandoned as shown by an order or judgment of the court, shall be left out of the record.

TRANSCRIPT ON APPEAL OR WRIT OF ERROR.

85. In making a transcript, the proceedings shall be entered in the order of time in which they occurred, as prescribed in the preceding rule unless, with the approval of the judge, counsel on each side shall agree in writing, to be itself filed and copied in the transcript, directing the clerk which of the papers may be left out, as being useless in the decision of the case; *provided*, subpoenas shall not be inserted, nor shall the citations, in cases where the defendant or defendants have filed answers, unless some question is made upon them which will require them to be copied.

86. All bills of exceptions and statements of facts shall be literally transcribed; and the clerks are hereby prohibited from copying as parts of the same any instrument in writing, or document not originally inserted therein, but merely referred to and directed to be copied from some other paper in the case.

87. In copying the proceedings inserted in the transcript, there shall be a space left between them, so that each one can readily be distinguished.

88. On the left hand margin of the page of each proceeding the clerk shall note its name, and the date of its occurring or being filed. This may be dispensed with in printed transcripts; but in all cases the clerk shall copy, in connection with each paper filed, the file mark subscribed or indorsed thereon.

89. The pages shall be numbered at the bottom, on the left hand of each page.

90. The transcript may be either written or printed. If written, it shall be on good white paper, with black ink, in a plain, round hand, not confused by running words together or by flourishes, and with sufficient space between the lines to be easily read, and on one side only of each sheet of paper, with no sheets cut or mutilated, and the sheets shall be entire and filled with writing, so as to leave no blanks larger than the ordinary spaces left between the different proceedings to distinctly separate them; and all the sheets upon which it is written shall be fastened together at the upper end with tape, ribbon, or something of the kind, and sealed over the tie with the seal of the court. When the transcript is printed it must be on both sides of the paper, in not less than small pica type, bound and paged in pamphlet form, of octavo size, and fastened at the back with the tie and seal of the court; but in other respects shall conform to the rules laid down for written transcripts.

91. The caption of the transcript shall be in the following form, to wit:

"THE STATE OF TEXAS, }
 "County of..... }

"At a term of the district [or county] court, begun and holden at....., within and for the county of....., before the Hon., and ending on the day of, A. D....., the following case came on for trial, to wit:

"A. B., plaintiff,

v.

"C. D., defendant."

92. There shall be an index on the first pages preceding the caption, giving the name and page of each proceeding, including the name and page of each instrument in writing and agreement, and the testimony of each witness in the statement of facts, as it appears from the transcript. The index shall not be alphabetical, but shall conform to the order in which the proceedings appear as transcribed.

93. The transcript shall contain a bill of costs, regularly made out and copied.

94. It shall conclude with a certificate, under the seal of the court, that it contains a true copy of all the proceedings in the cause, and shall be dated and signed officially by the clerk.

95. The clerk having made a transcript, upon the application of either party or his counsel, as prescribed in case of appeal, and in case of writ of error, as directed by law, shall deliver it to such party or his counsel when so made out, on demand, such delivery as to the appellant or plaintiff in error to be made to him or his counsel within sixty days from the perfection of the appeal or the service of the writ of error.

96. The notice of appeal and giving a bond on an appeal, and the filing of a petition and bond for writ of error, and the service of citations, will be regarded as an application to the clerk to prepare at once a transcript of the record for the appellant, or plaintiff in error, without further application.

97. The appellee, or defendant in error, or his counsel, to be entitled to a transcript of the record, shall specially make an application to the clerk to make it out for him.

98. The clerk, having prepared a transcript, shall indorse upon it as follows, to wit:

“J. K., Appellant, or Plaintiff in Error,

v.

“N. M., Appellee, or Defendant in Error.

“From.....County.”

And on delivery of it to the party, or to his counsel, who had applied for it, he shall in all cases indorse upon it, before it finally leaves his hands, as follows:

“Applied for by P. S. on theday of....., A. D....., and delivered to P. S. on the..... day of....., A. D.....,” and shall sign his name officially thereto. The same indorsement shall be made on certificates for affirmance of the judgment.

99. Unless when specially directed by statute, the clerk of a trial court is not bound to transmit any transcript to a Court of Civil Appeals.

100. When the clerk shall have presented a transcript for examination to the party or his counsel who has applied for it, and it is found, in any particular whatever, to have been made out in violation of any of the preceding requirements, he shall be at liberty to return it as not being a complete and properly prepared transcript, in time for correction by the clerk. And the reception of it by the party or his counsel, without being so returned for such purpose, will be regarded as an assumption by him of all responsibility for any and all deficiencies found in the transcript, resulting from the violation of these rules or of the statutes.

ASSIGNMENT OF ERRORS.

101. The appellant or plaintiff in error shall file his assignments of error in the trial court as prescribed by statute; and the appellee or defendant in error may file cross-assignments with the clerk of the trial court when he files his brief, which assignments may be

incorporated in his brief and need not be copied in the transcript. In such cases one of the copies filed in the Courts of Civil Appeals shall contain a certificate of the clerk of the trial court showing that it is a copy of the brief filed in his office, and the date of its filing.

BRIEFS.

102. Appellant or plaintiff in error shall file a copy of his brief in the trial court as directed by statute, which shall be received by the clerk, and he shall indorse upon it his filing, with the date of its delivery to him, and keep it among the papers of the cause, subject to inspection, in his office, by any of the parties or their counsel, and shall upon request, deliver a certified copy of it, and of his filing, with its date; or if copies thereof shall be presented to him, he shall certify thereto for the party requesting it, but it shall not be copied in the transcript.

JURISDICTION OF THE DISTRICT COURT OVER APPEALS OR WRITS OF ERROR.

103. When there shall be no bond or affidavit filed, the appeal or writ of error shall be considered as abandoned.

104. When no transcript of the record, or no certificate for affirmance has been filed in a court of civil appeals, at the term of the court to which the appeal or writ of error in which citation has been served is returnable, the appeal or writ of error shall be considered as abandoned, of which the certificate of the proper clerk of the appellate court, given at the end of said term, that no such case has been filed in said court, shall be *prima facie* evidence.

105. Rules for the government of the district and county courts, heretofore made and published, shall be superseded from and after the time when these rules shall go into effect.

RULES OF THE DISTRICT COURT IN APPEALS IN ADMINISTRATION CASES FROM THE COUNTY COURT.

106. Motions to dismiss appeals shall be placed on the motion docket and determined as other motions.

107. Motions for *certiorari* to perfect the record shall be accompanied by a sworn statement, showing in what particular the transcript is defective, unless it shall sufficiently appear by the record itself. The cost of the motion and additional record, and of the term, if it causes a continuance of the case, shall be taxed against the appellant, whose duty it is to have a correct record filed, at the discretion of the court.

108. In appeals from the county court in cases pertaining to the estates of deceased persons, the transcript shall not contain anything which does not relate to the order, decision or judgment appealed from. Where the appeal has been taken by the same person

from more than one order, decision or judgment entered of record in the same estate, at the same term of the county court, all of the proceedings in each appeal being kept distinct, may be embraced in the same transcript.

RULES GOVERNING IN CRIMINAL CASES IN COUNTY AND DISTRICT COURTS.

109. The clerks of the district and county courts shall record the proceedings had in their courts in the order of time in which they occur.

110. The record should show, and it should appear in the transcripts of the record for the Court of Criminal Appeals:

First. That the indictment was presented in open court, a quorum of the grand jury being present.

Second. That the defendant pleaded to the indictment, or that a plea was entered for him.

Third. In capital felonies, that the defendant was arraigned and pleaded, or that, upon his refusal to plead, a plea was entered by the court.

Fourth. That the jury trying the causes were impaneled and sworn according to law.

Fifth. That a final judgment was entered in the cause.

111. Transcripts of the record for the Court of Criminal Appeals shall not be incumbered with copies of *capiases*, bonds, recognizances, subpoenas, attachments for witnesses, or any of the proceedings had on a former trial, where a new trial has been granted, unless there is some question expressly raised on the trial, with reference to such proceedings, which requires revision in the Court of Criminal Appeals, or in *scire facias* cases, on appeal or writ of error.

112. In preparing transcripts the following order shall be observed, to wit:

First. The index, which must refer to the proceedings in the order they appear in the record.

Second. The caption, which shall be as follows: "The State of Texas, county of..... At a term of the.....court, begun and holden within and for the county of.....at.....on theday of....., A. D. 18., and which adjourned on theday of....., A. D. 18., the Hon....., judge thereof, presiding, the following cause came on for trial, to wit:

"No. }	<i>The State of Texas,</i> v. <i>A. B.,</i> "
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Third. The time and manner of the presentation of indictment.

Fourth. The indictment or information.

Fifth. The pleas of defendant.

Sixth. The verdict and judgment.

Seventh. The statement of facts.

Eighth. The charge of the court.

Ninth. The charges refused.

Tenth. Bills of exception.

Eleventh. Motion for new trial, and motion in arrest of judgment, and notice of appeal.

Twelfth. Such other pleas, motions and orders as are made during the trial of the cause.

Thirteenth. Final judgment [or in a misdemeanor case the recognition or statement that defendant is in a jail.]

Fourteenth. Assignment of errors, if any are filed, and request, if any, to send transcript to a branch of the court other than that to which the appeal is returnable.

Fifteenth. Certificate of the clerk, under the seal of the court, which shall certify that the transcript contains a true copy of all the proceedings had in the cause.

113. In preparing the transcript the following directions must also be observed: It shall be written on good paper, on one side only, in a neat, legible hand, free from erasures and interlineations, leaving a margin of sufficient width, in which margin the clerk shall note the name of each proceeding, and the time of its occurring or being filed, and at the left-hand lower corner, mark the number of each page. At the end of each paper must be copied the file marks indorsed thereon, and a space should be left between the record of each separate paper or proceeding.

114. The transcript must be fastened at the upper end with tape or ribbon, and sealed over the tie with the seal of the court, and folded and indorsed as follows:

“A. B., appellant,

v.

“The State, appellee.

“From.....county district court [or county court], A. D. 18...”

115. The statement of facts must contain a full and complete statement of all facts in evidence on the trial of the cause, including copies of all papers, documents and exhibits adduced in evidence, also the proof of venue and identification of defendant.

116. The transcript of the record, where defendant has been convicted of a misdemeanor, must be delivered to the party appealing, or his counsel, but if not applied for before the twentieth day before the commencement of the term of the Court of Criminal Appeals to which the appeal is returnable, the clerk shall transmit the same by mail, paying the postage thereon, to the clerk of the Court of Criminal Appeals.

117. Transcripts of the record, where defendants have been convicted of a felony, shall be prepared within twenty days after the adjournment of the court, and sent by mail, postpaid, to the clerk of the Court of Criminal Appeals, at the branch to which the appeal is returnable. But where the defendant or his counsel directs the transcript to be sent to a branch of the court where the term is held before the term to which the appeal is returnable by law, the clerk

shall so transmit it, and send with such transcript a certified copy of such order or direction.

118. The clerk shall immediately after the adjournment of the court at which appeals in criminal cases are taken, make out a certificate under his seal of office, exhibiting a list of all such cases where the defendant has appealed. This certificate shall show the style of the cause upon the docket, the offense of which the defendant stands convicted, the day on which the judgment was rendered, and the day on which the appeal was taken, which list he shall transmit to the attorney-general at Austin.

119. It shall be the duty of the district and county attorney to see that the judgments in criminal cases are properly entered by the clerks, and, when practicable, they should be present when the minutes are read.

GENERAL RULES.

1. Any supposed violation of the rules prescribed in the conduct of a cause, to the prejudice of a party, may be reserved by bill of exception, presented as a ground for new trial, and assigned as error by the party who may conceive himself aggrieved by such supposed violation.

2. The foregoing rules shall go into effect and be of force in all the courts of the State, to which they are applicable, from and after this date (October 8, 1892); but shall not effect cases pending in the Supreme Court at the time of the organization of the Courts of Civil Appeals, which cases shall be controlled by the rules for the government of the Supreme Court at the time the appeals in such cases were perfected. Except as to such cases, all former rules are hereby superseded.

CLERK'S OFFICE, SUPREME COURT,
AUSTIN, TEXAS, February 7, 1901.

I, Charles S. Morse, Clerk of the Supreme Court of Texas, hereby certify that the above and foregoing thirty-six pages contain a true and correct copy of the rules adopted by this court on the 8th day of October, 1892, together with all amendments made thereto up to this date, for the government of the courts of Texas. I further certify that all of said rules and amendments are now in force and effect.

WITNESS MY HAND and the seal of said court this the
[L. S.] seventh day of February, A. D. 1901.

CHAS. S. MORSE, Clerk.

APPELLATE JURISDICTION OF SUPREME COURT.

SUPREME COURT—WRITS OF ERROR TO COURTS OF CIVIL APPEALS.

SECTION 1. *Be it enacted by the Legislature of the State of Texas:* That article 1011a of the Revised Civil Statutes of Texas, as amended by chapter 14 of the acts of the special session of the Twenty-second Legislature, be amended so as to read as follows:

Article 1011a. All cases shall be carried up to the Supreme Court by writs of error upon final judgment, and not on judgments reversing and remanding cases, except in the following cases, to wit:

1. Where the State is a party or where the railroad commissioners are parties.

2. Cases which involve the construction and application of the Constitution of the United States or of the State of Texas, or of an act of Congress.

3. Cases which involve the validity of a statute of the State.

4. Cases involving the title to a State office.

5. Cases in which a Civil Court of Appeals overrules its own decisions or the decision of another Court of Civil Appeals, or of the Supreme Court.

6. Cases in which the judges of any Court of Civil Appeals may disagree.

7. Cases in which any two of the Courts of Civil Appeals may hold differently on the same question of law.

8. When the judgment of the Court of Civil Appeals reversing a judgment practically settles the case, and this fact is shown in the petition for writ of error, and the attorneys for petitioners shall state that the decision of the Court of Civil Appeals practically settles the case, in which case, if the Supreme Court affirms the decision of the Court of Civil Appeals, it shall also render final judgment accordingly.

Whereas, there are a great number of bills now pending, and the session is nearing its close, therefore, there exists an imperative public necessity and emergency that the constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect from and after its passage, and it is so enacted.

Approved May 6, 1895.

PROCEDURE TO OBTAIN WRIT OF ERROR IN SUPREME COURT.

SUPREME COURT—WRITS OF ERROR TO COURTS OF CIVIL APPEALS.

SECTION 1. *Be it enacted by the Legislature of the State of Texas:* That article 1011b of the Revised Civil Statutes of Texas, as amended by chapter 14 of the acts of the special session of the Twenty-second Legislature be amended so as to read as follows:

Article 1011b. Any person desiring to sue out a writ of error before the Supreme Court shall present his petition addressed to said court, stating the nature of his case and the grounds upon which the writ of error is prayed for, and showing that the Supreme Court has jurisdiction thereof; and the petition shall contain such other requisites as may be prescribed by the Supreme Court. The petition shall be filed with the clerk of the Court of Civil Appeals within thirty days from the overruling of the motion for rehearing, and thereupon the said clerk of the Court of Civil Appeals shall note upon his record the filing of said application, and shall forward to the clerk of the Supreme Court the said application, together with the original record in the case, and the opinions of the Court of Civil Appeals, and the motion filed therein, and certified copies of the judgments and orders of the Court of Civil Appeals; *provided*, that the party applying for the writ of error shall deposit with the clerk of the Court of Civil Appeals a sum sufficient to pay the expressage or carriage of the said record to and from the clerk of the Supreme Court, which sum shall be charged as costs in the suit. If the writ of error be granted and the plaintiff in error has given no bond, then the Supreme Court in granting the writ shall specify what bond shall be given, and the plaintiff in error shall file said bond in the trial court, to be approved by the clerk of said court, and a certified copy thereof shall at once be transmitted to the Supreme Court, and upon the filing of said certified copy the clerk of the Supreme Court shall issue the citation in error as may be prescribed by the rules of the Supreme Court.

Approved May 6, 1895.

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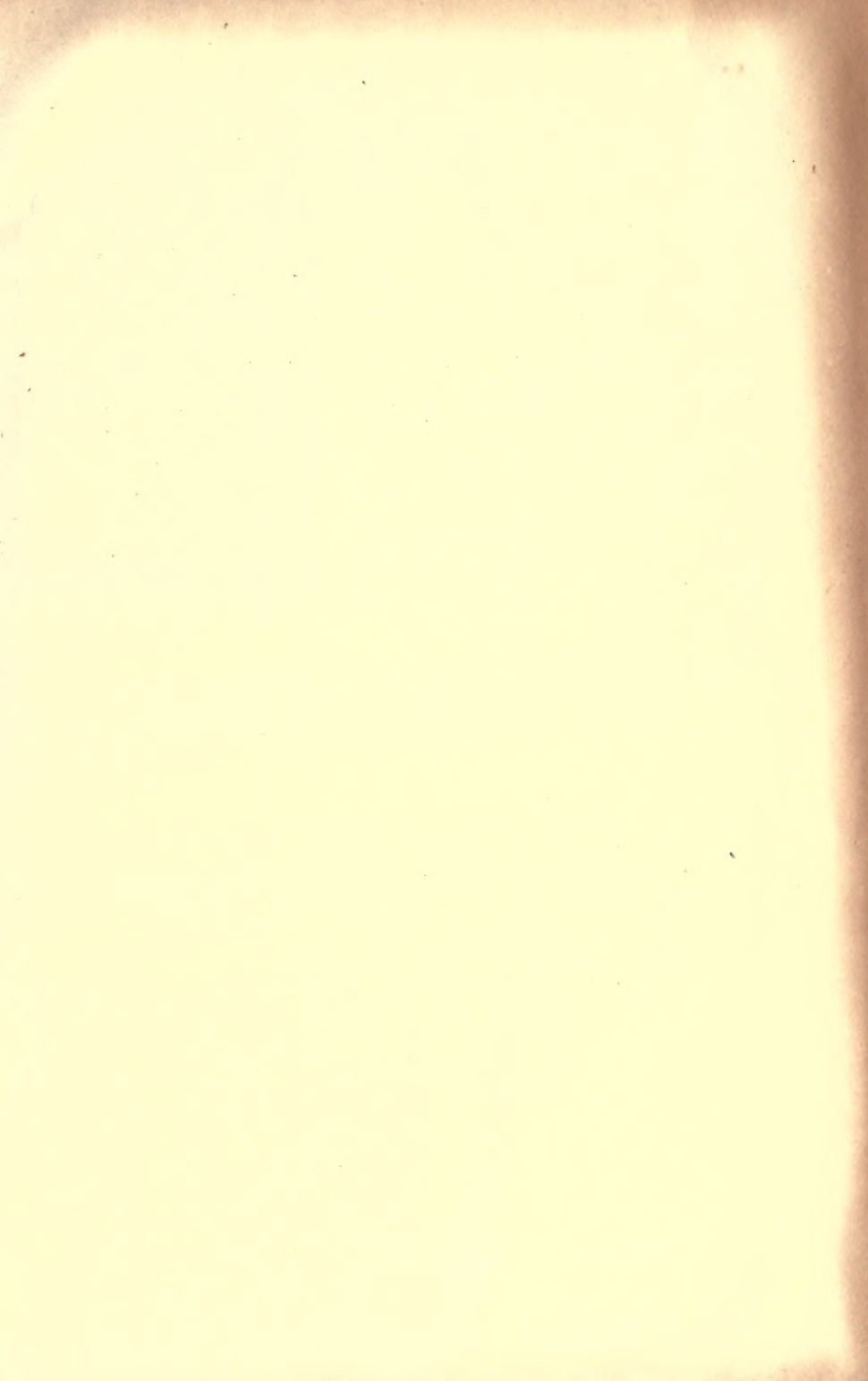


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